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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 160.

THE NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ABNER TOWNSEND, MINERVA TOWNSEND, AND JOSEPH HOLECEK.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED SEPTEMBER 6, 1901.

(18,260.)

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INDEX.

	Original.	Print.
Petition for writ of error	1	1
Writ of error	3	1
Citation	6	2
Acceptance of service of citation	7	3
Bond on writ of error	8	3
Assignment of errors	11	4
Caption	14	6
Transcript from district court	14	6
Complaint	14	6
Answer of defendants	17	7
Reply to answer of defendants	19	8
Order making Minerva Townsend party defendant	20	8
Answer of Minerva Townsend	21	9
Reply to answer of Minerva Townsend	23	9
Stipulation as to facts	24	10
Sketch showing section 24 and part of section 23	36	15
Findings of fact	37	15

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 15, 1902.

	Original	Print.
Conclusions of law	48	20
Opinion	48	21
Judgment	56	24
Notice of appeal	58	25
Waiver of appeal bond	58	26
Syllabus	59	26
Opinion	60	26
Judgment	72	32
Order for judgment	74	34
Minutes of argument	76	34
Clerk's certificate	79	35

1 STATE OF MINNESOTA:

Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLECEK, Defendants in Error.

Now comes the above-named Northern Pacific Railway Company, a corporation, plaintiff in error, and prays that a writ of error in the above-entitled case may issue to said the supreme court for the State of Minnesota to review a certain judgment entered in said court on the 26th day of July, 1901, in favor of the said Abner Townsend, Minerva Townsend and Joseph Holecek, defendants in error, and against the said Northern Pacific Railway Company, plaintiff in error, directing the district court for Wadena county, Minnesota, to enter judgment in favor of said defendants in error and to dismiss the complaint of said Northern Pacific Railway Company, plaintiff in error, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of Minnesota to the great damage of said plaintiff in error; all of which will more in detail appear in the assignment of errors which is filed with this petition.

NORTHERN PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

2 By C. W. BUNN &
JAMES B. KERR, *Its Attorneys.*

Dated, July 26th, 1901.

(Endorsed:) State of Minnesota. Supreme court. N. P. R'y Co. pl'ff in error, *vs.* Abner Townsend *et al.* def'ts in error. Petition for writ of error. C. W. Bunn and James B. Kerr att'ys for pl'ff in error. Filed July 26, 1901. D. F. Reese clerk.

3 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable supreme court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in a suit between Northern Pacific Railway Company, plaintiff, and Abner Townsend, Minerva Townsend and Joseph Holecek, defendants, said suit being there entitled "Northern Pacific Railway Company, plaintiff and respondent, *vs.* Abner Townsend, Minerva Townsend and Joseph Holecek, defendants and appellants," wherein was drawn in question the validity of a statute or an authority ex-

ercised under the United States and the decision was against its validity, a manifest error hath intervened, to the great damage of said Northern Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and ac-
4 cording to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 26th day of July in the year of our Lord, one thousand nine hundred and one.

{Seal U. S. Circuit Court, Dist. of Minnesota, Third Division.}

HENRY D. LANG,
Clerk of Circuit Court of United States for District of Minnesota,
By LOUISE B. TROTT, *Deputy.*

The above writ is hereby allowed.

CHAS. M. START,
Chief Justice of Supreme Court of Minnesota.

Dated July 26th, 1901.

5 [Endorsed:] State of Minnesota Supreme court N. P. R'y Co. pl'ff in error, *vs.* Abner Townsend *et al.* def'ts in error. Writ of error. Filed July 26, 1901 D. F. Reese clerk C. W. Bunn and James B. Kerr att'ys for pl'ff in error.

6 THE UNITED STATES OF AMERICA, *ss:*

To Abner Townsend, Minerva Townsend, and Joseph Holecek, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Minnesota, wherein Northern Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned, should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Charles M. Start, chief justice of the su-

preme court of the State of Minnesota, this 26th day of July, in the year of our Lord one thousand nine hundred and one.

CHAS. M. START,
Chief Justice of the Supreme Court of Minnesota.

7 [Endorsed:] Northern Pacific Railway Company plaintiff in error *vs.* Abner Townsend *et al.* defendants in error. Citation. Due service of within citation admitted this 29th day of July 1901 A. G. Broker attorney for Abner Townsend, Minerva Townsend and Joseph Holecek Filed July 26, 1901 D. F. Reese, clerk.

8 STATE OF MINNESOTA:

Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLECEK, Defendants in Error.

Know all men by these presents that the Northern Pacific Railway Company, a corporation organized and existing under the laws of the State of Wisconsin, as principal, and T. M. Hannaford and C. A. Clark, of the city of St. Paul and State of Minnesota, as sureties, are firmly bound unto Abner Townsend, Minerva Townsend and Joseph Holecek in the full and just sum of two hundred and fifth dollars ($250.00) to be paid to said Abner Townsend, Minerva Townsend and Joseph Holecek, their heirs, executors or assigns, for which payment well and truly to be made we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of July in the year of our Lord one thousand nine hundred and one.

Whereas lately in the supreme court of the State of Minnesota in a suit pending in said court between The Northern Pacific Railway Company, plaintiff, and Abner Townsend, Minerva
9 Townsend and Joseph Holecek, defendants, said suit being there entitled "Northern Pacific Railway Company, plaintiff and respondent, *vs.* Abner Townsend, Minerva Townsend and Joseph Holecek, defendants and appellants," judgment was rendered against the said plaintiff, Northern Pacific Railway Company, and the said plaintiff having obtained a writ of error and filed a copy thereof in the office of the clerk of said supreme court of Minnesota, to reverse the judgment in the aforesaid suit, and a citation directed to the said Abner Townsend, Minerva Townsend and Joseph Holecek citing and admonishing them to be and appear at the Supreme Court of the United States at the city of Washington on or before the 26th day of August, 1901;

Now, the condition of the above obligation is such that if the said Northern Pacific Railway Company shall prosecute the said writ of error to effect and answer all damages and costs, if it shall fail to

make its plea good, then the obligation to be void, otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. S. MELLEN, *President.*

[Seal Northern Pacific Railway Company, 1886.]

Attest: R. H. RELF,
Assistant Secretary.

J. M. HANNAFORD. [SEAL.]
C. A. CLARK. [SEAL.]

Signed, and delivered in presence of—
H. A. FABIAN.
R. H. JOHNSTON.

Approved by—
CHAS. M. START,
Chief Justice of the Supreme Court of the State of Minnesota.

Dated July 26th, 1901.

10 (Endorsed:) State of Minnesota Supreme court. N. P. R'y Co. pl'ff in error *vs.* Abner Townsend *et al.* def'ts in error. Bond on writ of error. C. W. Bunn and James B. Kerr att'ys for pl'ff in error. Filed July 26, 1901. D. F. Reese, clerk.

11 STATE OF MINNESOTA:

Supreme Court.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLECEK, Defendants in Error.

Assignments of Error.

Now comes the above-named plaintiff in error, Northern Pacific Railway Company, by C. W. Bunn and James B. Kerr, its attorneys, and assigns the following errors in the judgment of this court herein:

I.

The court erred in reversing the judgment of the district court for Wadena county, Minnesota.

II.

The court erred in directing judgment to be entered by the district court for Wadena county, Minnesota, in favor of the defendants.

III.

The court erred in dismissing plaintiff's action.

12 IV.

The court erred in holding and deciding that any portion of the right of way granted by that certain act of Congress approved July 2, 1864, entitled "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," to the Northern Pacific Railroad Company could be acquired by the adverse possession and occupation of the defendants under the statutes of Minnesota.

V.

The court erred in denying the title of the Northern Pacific Railway Company to the premises in controversy founded upon the grant by the United States to the Northern Pacific Railroad Company, the predecessor in interest of said Northern Pacific Railway Company.

VI.

The court erred in its judgment wherein and whereby it held that the defendants in error had a right to use and occupy the land in controversy notwithstanding the grant thereof under the said act of Congress of July 2nd, 1864, to the said Northern Pacific Railroad Company, predecessor in interest of the plaintiff in error.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN &
JAMES B. KERR, *Its Attorneys.*

Dated July 26th 1901.

13 (Endorsed:) 12645. State of Minnesota. Supreme court. N. P. R'y Co. pl'ff in error *vs.* Abner Townsend *et al.* def'ts in error. Assignment of errors. Filed July 26, 1901. D. F. Reese, clerk. C. W. Bunn and James B. Kerr att'ys, for pl'ff in error.

14 STATE OF MINNESOTA:

Supreme Court, April Term, 1901.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff and Respondent,
vs.
ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLECECK, Defendants and Appellants.

Complaint.

STATE OF MINNESOTA:

District Court, County of Wadena, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
ABNER TOWNSEND & JOSEPH HOLECECK, Defendants.

Plaintiff complaining of the defendants above named shows to the court and alleges:

15 Plaintiff is a corporation organized and existing under the laws of the State of Wisconsin and duly authorized to transact business in the State of Minnesota, and is now and for a long time past has been the owner and entitled to the immediate possession of those certain premises lying and being in the county of Wadena, State of Minnesota, more particularly described as follows, to wit:

Commencing at a point on the east line of the northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred thirty-four (134) north of range thirty-five (35) west of the fifth principal meridian, two hundred (200) feet north of the center line of the Northern Pacific railroad, as the same is laid out, located and constructed over and across said section twenty-four (24); thence in a northwesterly direction parallel to and two hundred (200) feet distant from the line of said railroad to the west line of said northwest quarter (N. W. ¼) of said section twenty-four (24); thence south on the west line of the northwest quarter (N. W. ¼) of said section twenty-four (24) four hundred (400) feet; thence in a southeasterly direction parallel with and distant two hundred (200) feet from the line of said railroad to the east boundary line of said northwest quarter (N. W. ¼) of said section twenty-four (24); thence north along the east boundary line of said northwest quarter (N. W. ¼) of said section twenty-four (24) to the point of beginning.

Defendants heretofore wrongfully and unlawfully entered upon, took and now hold possession of said premises and all
16 thereof, save and except the railroad track laid thereon, and have deprived and now deprive the plaintiff of the use and possession thereof.

The use and occupation of said premises so occupied by said defendants since the defendants so entered thereon is reasonably worth the sum of one hundred dollars ($100) in which sum the said plaintiff has been damaged by the said wrongful entry and detention of said premises.

Wherefore plaintiff prays judgment against said defendants for the possession of the premises above described and for the sum of one hundred dollars ($100), together with the costs and disbursements of this action.

C. W. BUNN,
L. T. CHAMBERLAIN,
JAMES B. KERR,
Attorneys for Plaintiff, Northern Pacific Railway Company, General Office Building, St. Paul, Minnesota.

(Verification.)

17

Answer.

STATE OF MINNESOTA, *ss:*

District Court, County of Wadena, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
ABNER TOWNSEND & JOSEPH HOLECECK, Defendants.

For an answer to the complaint of the plaintiff herein said defendants admit that said plaintiff is a corporation as alleged in said complaint. Deny that said plaintiff is the owner of and entitled to the possession of the premises mentioned and described in said complaint except a strip of land lying and being on the south side of said railroad fifty feet wide alongside of and parallel to the center line of said railroad track and a strip of land one hundred feet wide and lying alongside of and parallel to the center line of said track on the north side thereof across the northwest quarter of said section twenty-four. That all of the land described in said complaint except the strips mentioned herein is the property of Minerva E. Townsend and has been for many years last past. That
18 neither the said plaintiff nor its predecessor or grantor were seized or possessed of the said premises within twenty years before the commencement of this action, but that said defendant, Joseph Holecceck, and Minerva E. Townsend under whom said Holecceck holds by lease, her predecessors and grantors have held and possessed the said premises adversely to the pretended title of said plaintiff for more than fifteen years prior to the commencement of this action. That during all of said time said premises have been usually cultivated and improved for the ordinary use of said occupants. Further answering said complaint said defendants deny each and every allegation, matter and thing in said complaint contained not herein otherwise admitted or denied.

Wherefore said defendants pray for a judgment of this court that this action be dismissed and that they have judgment for their costs.

Dated July 24th, 1900.

A. G. BROKER,
Attorney for Defendants, Wadena, Minn.

(Verification.)

19 *Reply*

STATE OF MINNESOTA:

District Court, County of Wadena, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
ABNER TOWNSEND & JOSEPH HOLECECK, Defendants.

The plaintiff above named for reply to the matters and things set forth in the answer of the defendants above named respectfully shows to the court that it denies that the plaintiff or its predecessor or grantor has not been seized or possessed of the premises described in the answer herein within twenty (20) years before the commencement of this action and denies that the said Joseph Holececk, Minerva E. Townsend, or either of them, have held or possessed the said premises or any part thereof adversely or otherwise for a period of fifteen (15) years prior to the commencement of this action.

20 Wherefore the said plaintiff prays judgment as in the complaint herein demanded.

Dated, July 31st, A. D. 1900.

C. W. BUNN,
L. T. CHAMBERLAIN,
JAMES B. KERR,
Attorneys for Plaintiff, Northern Pacific —,
General Office Building, St. Paul, Minnesota.

(Verification).

Order.

STATE OF MINNESOTA, } ss:
County of Wadena,

NORTHERN PACIFIC RAILWAY COMPANY
vs.
ABNER TOWNSEND & JOSEPH HOLECECK.

Upon the pleadings and papers on file herein and upon motion of James B. Kerr, attorney for the plaintiff, A. G. Broker, attorney appearing for the defendants Abner Townsend and Joseph Holececk, and it appearing to the court that Minerva Townsend, the wife of the defendant, Abner Townsend, is a necessary party to the above-entitled action,

It is ordered, that said Minerva Townsend be and she is

21 hereby made a party defendant hereto, and allowed twenty days from the entry of this order to answer to the complaint herein.

Dated, Wadena, Minn., Dec. 11, 1900.

By the court,

D. B. SEARLE,
District Judge.

Answer of Minerva Townsend.

STATE OF MINNESOTA, *ss:*

District Court, County of Wadena, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
ABNER TOWNSEND, JOSEPH HOLECECK, and MINERVA E. TOWNSEND, Defendants.

For an answer to the complaint of the plaintiff herein the said defendant, Minerva E. Townsend, admits that said plaintiff is a corporation as alleged in said complaint. Denies that said plaintiff is the owner and entitled to the possession of the premises mentioned and described in said complaint except a strip fifty feet wide on the south side of the center line of said railroad track and a strip
22 one hundred feet wide on the north side of the center line of said track running across the northwest quarter of section 24 in township 134 north of range 35 in Wadena county, aforesaid, said strips being alongside of and parallel to said center line.

That said land, except the strips above mentioned, is the property of said defendant, Minerva E. Townsend, and has been for many years last past and she is entitled to the possession of the same and for more than fifteen years last past said Minerva E. Townsend and her predecessors and grantors have been in the open, notorious, exclusive and adverse possession of said land and *has* held the same adversely to the pretended title of said plaintiff.

Wherefore, said defendant prays that this action may be dismissed and that she have judgment for her costs and disbursements.

Dated Dec. 29th, 1900.

A. G. BROKER,
Attorney for Defendants, Wadena, Minn.

(Verification.)

23 *Reply.*

STATE OF MINNESOTA:

District Court, County of Wadena, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
ABNER TOWNSEND, JOSEPH HOLECECK, and MINERVA TOWNSEND, Defendants.

Plaintiff above named for reply to the matters and things set forth in the answer of the defendant Minerva Townsend, shows to the court:

That it denies that said defendant Minerva Townsend is the owner

of or has any interest or right of possession in the land described in the complaint herein; and denies that said Minerva Townsend, her predecessor- and grantors, or any of them, have held or possessed the said premises described in the said complaint, or any part thereof, adversely or otherwise for a period of fifteen years previous to the commencement of this action.

Wherefore, plaintiff prays judgment as in the complaint herein demanded.

C. W. BUNN,
L. T. CHAMBERLAIN,
JAMES B. KERR,
Attorneys for Plaintiff.

(Verification.)

24 STATE OF MINNESOTA, } ss:
County of Wadena, }

District Court, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* ABNER TOWNSEND, MINERVA TOWNSEND, and Joseph Holececk, Defendants. } Stipulation of Facts.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following statement is true:

That by an act of Congress approved July 2, 1864, entitled:
25 "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast, by the northern route," the Northern Pacific Railroad Company was created as a corporation and was authorized to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances, namely, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible route as shall be determined by said company within the territory of the United States on a line north of the 45th degree of latitude to some point on Puget's sound.

II.

By section 2 of said act of Congress it is provided:

"And be it further enacted that the right of way through the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed and the power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, materials of earth, stone, timber, etc., for the construction thereof.

Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain." * * *

III.

By section 12 of said act of Congress it was provided that
26 the acceptance of the terms, conditions and impositions of said act by said Northern Pacific Railroad Company should be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained and that such acceptance should be made within two years after the passage of the act and should be served on the President of the United States. That in pursuance of said section 12 of said act of Congress, and on the 29th day of December, A. D. 1864, said Northern Pacific Railroad Company served such written acceptance on the President of the United States, said acceptance being under the corporate seal of said company, executed pursuant to the direction of its board of directors first had and obtained.

IV.

That prior to the 21st day of November, 1871, the said Northern Pacific Railroad Company definitely located that portion of the line of its said railroad extending from a point in section five (5), township forty-eight (48) north, of range sixteen (16) west of the fourth principal meridian, westwardly over and across the State of Minnesota to a point at Fargo on the eastern boundary of the then Territory of Dakota; and on the 21st day of November, 1871, caused a map showing the line of said definite location, duly approved by the Secretary of the Interior, to be filed in the office of the Commissioner of the General Land Office. That said line of definite
27 location, so located as aforesaid, crossed the northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35) west of the fifth principal meridian, Minnesota.

V.

That in the years 1870 and 1871, the said Northern Pacific Railroad Company constructed its railroad and telegraph line on, over and along that portion of its line of definite location so fixed November 21, 1871, as aforesaid, and over and across the said northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35) west of the fifth principal meridian, Minnesota; and said railroad as so constructed follows exactly the line of definite location as fixed November 21, 1871, and so far as the northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35) west of the fifth principal meridian, Minnesota, is concerned, no change in the location of the constructed road has ever been made.

VI.

That thereafter the President of the United States appointed three commissioners to examine that portion of the said railroad and telegraph line so constructed as hereinbefore set forth, and, having ex-

amined it, said commissioners, on December 10, 1872, reported
28 to the Secretary of the Interior that that portion of said railroad and telegraph line had been constructed in a good, substantial and workmanlike manner, in all respects as required by the act of Congress of July 2, 1864; that thereafter, to wit: January 6, 1873, the Secretary of the Interior transmitted said report to the President of the United States with the recommendation that said portion of road be accepted; and on January 6, 1873, said report was accepted and said recommendation approved by the President of the United States.

VII.

That on July 2, 1864, there had been no entries or filings, or applications to make entry or filing, upon the said northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35) west of the fifth principal meridian, Minnesota, and said described land was on said date public land to which the United States had full title, and the same was not reserved or otherwise appropriated.

VIII.

That the plaintiff, The Northern Pacific Railway Company, has succeeded to all the right, title and interest which the said Northern Pacific Railroad Company may have had in and to the premises described in the complaint by virtue of being the purchaser of all the railroad property of said Northern Pacific Railroad Company
29 at a foreclosure sale held under a decree of foreclosure foreclosing certain mortgages of said railroad company executed under the authority conferred by that certain joint resolution of the Congress of the United States, entitled: "A joint resolution authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870.

IX.

That Abner Townsend settled upon the north half of northwest quarter (N. ½ of N. W. ¼), the southwest quarter of northwest quarter (S. W. ¼ N. W. ¼) and northwest quarter of southwest quarter (N. W. ¼, S. W. ¼) of section twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35), west of the fifth principal meridian, Minnesota, on December 1, 1878, with the intention of acquiring title thereto under the public land laws of the United States, and has continued to reside thereon ever since said date. That thereafter, and on December 23, 1878, he filed preemption declaratory statement No. 4647 for said land; and on September 5, 1881, made homestead entry No. 11500 therefor. That thereafter said Townsend duly made final proof and payment for said land, as required by the laws of the United States relating to homestead entries upon the public lands, and on September 28,

1885, receiver's final certificate No. 5890 was issued to him,
30 wherein it was recited that said Townsend was entitled to a patent from the United States for the land last above described; and on November 30, 1885, a patent for said land was issued to him by the United States.

That on February 1, 1882, one George H. Brown made homestead entry No. 11754 for the northeast quarter of southwest quarter (N. E. ¼, S. W. ¼) and southeast quarter of northwest quarter (S. E. ¼, N. W. ¼) of said section twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35) west of the fifth principal meridian, and established his residence thereon, which residence was thereafter continuously maintained until the sale of the land by him as hereinafter set forth.

That thereafter said Brown duly made final proof and payment for said land, as required by the laws of the United States relating to homestead entries upon the public lands, and on December 26, 1887, receiver's final certificate No. 6398 was issued to him, wherein it was recited that said Brown was entitled to a patent from the United States for the land last above described; and on July 24, 1889, a patent for said land was issued to him by the United States.

That neither the said patent so issued to said Abner Townsend, nor the said patent so issued to George H. Brown contained any exception of right of way, but the same purported to convey the whole of the Government subdivisions therein described.

31 That thereafter, and on December 28, 1886, the said Abner Townsend and wife, by warranty, conveyed to one Elias C. Morse the north half of the northwest quarter (N. ½, N. W. ¼), and southwest quarter of the northwest quarter (S. W. ¼, N. W. ¼) and northwest quarter of southwest quarter (N. W. ¼, S. W. ¼) of said section twenty-four (24).

That on March 12, 1887, the said Elias C. Morse and wife, by warranty deed, conveyed the premises last above described to the defendant Minerva Townsend, and neither of said two deeds last above mentioned contained any exception or reservation of any part of said premises for right of way purposes, but the same purported to convey the whole of the Government subdivisions therein described.

That on June 14, 1888, the said George H. Brown and wife conveyed, by warranty deed, to Wellington Bowker, the southeast quarter of northwest quarter (S. E. ¼, N. W. ¼) and the northeast quarter of southwest quarter (N. E. ¼, S. W. ¼), and on August 9, 1890, the said Wellington Bowker and wife conveyed, by warranty deed, to the defendant Minerva Townsend, the premises last above described, and neither of said two deeds last above mentioned contained any reservation or exception of any portion of said premises for right of way purposes, but purported to convey the whole of the Government subdivisions therein described.

That from the time the said northwest quarter of said section twenty-four (24) became taxable up to and including the
32 year 1893, the same was described upon the assessment-rolls of the said county of Wadena as containing four tracts of

forty acres each and no deduction or exception was made from any thereof upon account of any railroad right of way, and the said defendant, Minerva Townsend, and her grantors during said period up to and including the year 1893 paid taxes upon said northwest quarter of said section twenty-four (24) without any deduction or allowance upon account of any such right of way over said quarter section.

That in the year 1893 the officers of said Wadena county were advised that the Northern Pacific Railroad Company claimed a right of way four hundred feet in width over and across the said northwest quarter of said section twenty-four (24), and thereafter the said acreage contained in a strip of land extending across said quarter section four hundred feet in width was deducted from said quarter section and in assessing the same, taxes were levied and extended against said quarter section less the right of way so claimed by said railroad company. That said action by said officers of said Wadena county was taken by them upon their own motion and without any request or demand upon the part of said defendant Minerva Townsend, or any one in her behalf.

That no plat or map was ever filed by the plaintiff or its predecessor, the Northern Pacific Railroad Company, in said Wadena county, showing the quantity of land claimed by it as right of way over any of the lands in said Wadena county.

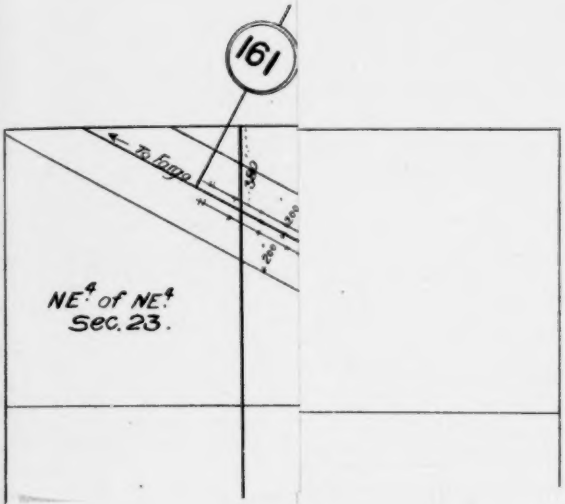
33 That at or about the year 1880 the said Northern Pacific Railroad Company constructed a fence on each side of its said railroad, as so constructed, over and across the said northwest quarter of said section twenty-four (24), said fence being situated parallel to and fifty feet distant from the center line of the track of said railroad, and at the same time the railroad company constructed a snow fence upon the north side of said track parallel with and one hundred feet distant therefrom. That said snow fence so constructed by said railroad company is ten hundred and twenty feet in length and extends from a point one hundred and eighty feet distant from the quarter-quarter line between the northeast quarter of the northwest quarter and the northwest quarter of the northwest quarter of said section twenty-four (24), measured on the line of said fence, northwesterly to a point eight hundred and forty feet distant from the quarter-quarter line between the northeast quarter of the northwest quarter and the northwest quarter of the northwest quarter of said section twenty-four (24), measured on the line of said fence.

That said defendant Minerva Townsend and her grantors have cleared and broken the whole of said northwest quarter of said section twenty-four (24) and have cultivated and used the same for agricultural purposes ever since the same was entered as hereinbefore set forth, up to said fences fifty feet distant from said railroad track on each side thereof.

34 That said northwest quarter of said section twenty-four (24) is more than two miles distant from any station, town or village, and there is no branch, spur or side track located thereon, or any track, except the main line of the railroad of said plaintiff.

That no demand has ever been served or made upon the defend-

254



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38 tled: "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's

ant Minerva Townsend, or on Abner Townsend, on Wellington Bowker or George H. Brown, or Elias C. Morse, or any tenant of any of the persons last above named, by the said plaintiff, or its predecessor in interest, for the possession of the premises so occupied by said defendant, as hereinbefore set forth, until within thirty days before the commencement of this action.

That during the period hereinbefore set forth, and while the said defendant Minerva Townsend and her grantors have been engaged in cultivating the said premises, as hereinbefore set forth, the said defendant and her grantors have been in the open, notorious and exclusive possession of the whole of said northwest quarter of said section twenty-four (24), up to the said fences fifty feet distant from the center of said track on the south side thereof, and up to the snow fence one hundred feet distant from said track on the north side thereof, and the officers and agents of said plaintiff and of its predecessor, the Northern Pacific Railroad Company, have had knowledge of said use and occupation. That up to thirty days before the commencement of this action, neither Minerva Town-
35 send, nor any of her grantors, have had actual knowledge of any right or claim by the plaintiff or its predecessor, the Northern Pacific Railroad Company, in or to the premises so occupied by said defendant Minerva Townsend and her grantors, as hereinbefore set forth.

C. W. BUNN,
JAMES B. KERR,
Attorneys for Plaintiff.
A. G. BOOKER,
Attorney for Defendants.

Dated the 23 day of Feb'y 1901.

(Here follows diagram marked p. 36.)

37 *Findings of Fact and Conclusions of Law.*

STATE OF MINNESOTA:

District Court, County of Wadena, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLECECK, Defendants.

This cause coming on to be heard before the court without a jury, the parties, by their attorneys, consenting that this cause be tried without a jury, and the parties, by their attorneys, having filed herein a stipulation of facts covering the issues raised by the pleadings herein, the court now finds facts as follows:

I.

38 That by an act of Congress approved July 2, 1864, entitled: "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's

sound on the Pacific coast, by the northern route," the Northern Pacific Railroad Company was created as a corporation and was authorized to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with the appurtenances, namely, beginning at a point on Lake Superior in the State- of Minnesota or Wisconsin, thence westerly by the most eligible route as shall be determined by said company within the territory of the United States on a line north of the 45th degree of latitude to some point on Puget's sound.

II.

By section 2 of said act of Congress it is provided:

"And be it further enacted that the right of way through the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph — as proposed and the power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, materials of earth, stone, timber, etc., for the construction thereof.

Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain. * * *"

III.

By section 12 of said act of Congress it was provided that
39 the acceptance of the terms, conditions and impositions of said act by said Northern Pacific Railroad Company should be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained and that such acceptance should be made within two years after the passage of the act and should be served on the President of the United States. That in pursuance of said section 12 of said act of Congress, and on the 29th day of December, A. D. 1864, said Northern Pacific Railroad Company served such written acceptance on the President of the United States, said acceptance being under the corporate seal of said company, executed pursuant to the direction of its board of directors first had and obtained.

IV.

That prior to the 21st day of November, 1871, the said Northern Pacific Railroad Company definitely located that portion of the line of its said railroad extending from a point in section five (5), township forty-eight (48) north, of range sixteen (16) west of the fourth principal meridian, westwardly over and across the State of Minnesota to a point at Fargo on the eastern boundary of the then Territory of Dakota; and on the 21st day of November, 1871, caused a map showing the line of said definite location, duly approved by the Secretary of the Interior, to be filed in the office of the Commissioner of the General Land Office. That said line of definite
40 location, so located as aforesaid, crossed the northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred

thirty-four (134) north, of range thirty-five (35) west of the fifth principal meridian, Minnesota.

V.

That in the years 1870 and 1871, the said Northern Pacific Railroad Company constructed its railroad and telegraph line on, over and along that portion of its line of definite location so fixed November 21, 1871, as aforesaid, and over and across the said northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35) west of the fifth principal meridian, Minnesota; and said railroad as so constructed follows exactly the line of definite location as fixed November 21, 1871, and so far as the northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35) west of the fifth principal meridian, Minnesota, is concerned, no change in the location of the constructed road has ever been made.

VI.

That thereafter the President of the United States appointed three commissioners to examine that portion of the said railroad and telegraph line so constructed as hereinbefore set forth, and, having examined it, said commissioners, on December 10, 1872, reported
41 to the Secretary of the Interior that that portion of said railroad and telegraph line had been constructed in a good, substantial and workmanlike manner, in all respects as required by the act of Congress of July 2, 1864; that thereafter, to wit: January 6, 1873, the Secretary of the Interior transmitted said report to the President of the United States with the recommendation that said portion of road be accepted; and on January 6, 1873, said report was accepted and said recommendation approved by the President of the United States.

VII.

That on July 2, 1864, there had been no entries or filings, or applications to make entry or filing, upon the said northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35) west of the fifth principal meridian, Minnesota, and said described land was on said date public land to which the United States had full title, and the same was not reserved or otherwise appropriated.

VIII.

That the plaintiff, The Northern Pacific Railway Company, has succeeded to all the right, title and interest which the said Northern Pacific Railroad Company may have had in and to the premises described in the complaint by virtue of being the purchaser of all the railroad property of said Northern Pacific Railroad Com-
42 pany at a foreclosure sale held under a decree of foreclosure foreclosing certain mortgages of said railroad company executed under the authority conferred by that certain joint resolution of the Congress of the United States, entitled: "A joint resolu-

tion authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgage, and for other purposes," approved May 31, 1870.

IX.

That Abner Townsend settled upon the north half of northwest quarter (N. ½ of N. W. ¼), the southwest quarter of northwest quarter (S. W. ¼ N. W. ¼) and northwest quarter of southwest quarter (N. W. ¼, S. W. ¼) c. ection twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35), west of the fifth principal meridian, Minnesota, on December 1, 1878, with the intention of acquiring title thereto under the public land laws of the United States, and has continued to reside thereon ever since said date. That thereafter, and on December 23, 1878, he filed pre-emption declaratory statement No. 4647 for said land; and on September 5, 1881, made homestead entry No. 11500 therefor. That thereafter said Townsend duly made final proof and payment for said land, as required by the laws of the United States relating to homestead entries upon the public lands, and on September 28, 1885, receiver's final certificate No. 5890 was issued to him, wherein
43 it was recited that said Townsend was entitled to a patent from the United States for the land last above described; and on November 30, 1885, a patent for said land was issued to him by the United States.

That on February 1, 1882, one George H. Brown made homestead entry No. 11754 for the northeast quarter of southwest quarter (N. E. ¼, S. W. ¼) and southeast quarter of northwest quarter (S. E. ¼, N. W. ¼) of said section twenty-four (24), township one hundred thirty-four (134) north, of range thirty-five (35) west of the fifth principal meridian, and established his residence thereon, which residence was thereafter continuously maintained until the sale of the land by him as hereinafter set forth.

That thereafter said Brown duly made final proof and payment for said land, as required by the laws of the United States relating to homestead entries upon the public lands, and on December 26, 1887, receiver's final certificate No. 6398 was issued to him, wherein it was recited that said Brown was entitled to a patent from the United States for the land last above described; and on July 24, 1889, a patent for said land was issued to him by the United States.

That neither the said patent so issued to said Abner Townsend, nor the said patent so issued to George H. Brown contained any exception of right of way, but the same purported to convey the whole of the Government subdivisions therein described.

44 That thereafter, and on December 28, 1886, the said Abner Townsend and wife, by warranty, conveyed to one Elias C. Morse the north half of the northwest quarter (N. ½, N. W. ¼), and southwest quarter of the northwest quarter (S. W. ¼, N. W. ¼) and northwest quarter of southwest quarter (N. W. ¼, S. W. ¼) of said section twenty-four (24).

That on March 12, 1887, the said Elias C. Morse and wife, by warranty deed, conveyed the premises last above described to the

defendant Minerva Townsend, and neither of said two deeds last above mentioned contained any exception or reservation of any part of said premises for right of way purposes, but the same purported to convey the whole of the Government subdivisions therein described.

That on June 14, 1888, the said George H. Brown and wife conveyed, by warranty deed, to Wellington Bowker, the southeast quarter of northwest quarter (S. E. ¼, N. W. ¼) and the northeast quarter of southwest quarter (N. E. ¼, S. W. ¼), and on August 9, 1890, the said Wellington Bowker and wife conveyed, by warranty deed, to the defendant Minerva Townsend, the premises last above described, and neither of said two deeds last above mentioned contained any reservation or exception of any portion of said premises for right of way purposes, but purported to convey the whole of the Government subdivisions therein described.

That from the time the said northwest quarter of said section twenty-four (24) became taxable up to and including the
45 year 1893, the same was described upon the assessment-rolls of the said county of Wadena as containing four tracts of forty acres each and no deduction or exception was made from any thereof upon account of any railroad right of way, and the said defendant, Minerva Townsend, and her grantors during said period up to and including the year 1893 paid taxes upon said northwest quarter of said section twenty-four (24) without any deduction or allowance upon account of any such right of way over said quarter section.

That in the year 1893 the officers of said Wadena county were advised that the Northern Pacific Railroad Company claimed a right of way four hundred feet in width over and across the said northwest quarter of said section twenty-four (24), and thereafter the said acreage contained in a strip of land extending across said quarter section four hundred feet in width was deducted from said quarter section and in assessing the same, taxes were levied and extended against said quarter section less the right of way so claimed by said railroad company. That said action by said officers of said Wadena county was taken by them upon their own motion and without any request or demand upon the part of said defendant Minerva Townsend, or any one in her behalf.

That no plat or map was ever filed by the plaintiff or its predecessor, the Northern Pacific Railroad Company, in said Wadena county showing the quantity of land claimed by it as right of way over any of the lands in said Wadena county.

46 That at or about the year 1880 the said Northern Pacific Railroad Company constructed a fence on each side of its said railroad, as so constructed, over and across the said northwest quarter of said section twenty-four (24), said fence being situated parallel to and fifty feet distant from the center line of the track of said railroad, and at the same time the said railroad company constructed a snow fence upon the north side of said track parallel with and one hundred feet distant therefrom. That said snow fence so constructed by said railroad company is ten hundred and twenty

feet in length and extends from a point one hundred and eighty feet distant from the quarter-quarter line between the northeast quarter of the northwest quarter and the northwest quarter of the northwest quarter of said section twenty-four (24), measured on the line of said fence, northwesterly to a point eight hundred and forty feet distant from the quarter-quarter line between the northeast quarter of the northwest quarter and the northwest quarter of the northwest quarter of said section twenty-four (24), measured on the line of said fence.

That said defendant Minerva Townsend and her grantors have cleared and broken the whole of said northwest quarter of said section twenty-four (24) and have cultivated and used the same for agricultural purposes ever since the same was entered as hereinbefore set forth, up to said fences fifty feet distant from said railroad track on each side thereof.

47 That said northwest quarter of said section twenty-four (24) is more than two miles distant from any station, town or village, and there is no branch, spur or side track located thereon, or any track, except the main line of the railroad of said plaintiff.

That no demand has ever been served or made upon the defendant Minerva Townsend, or on Abner Townsend, on Wellington Bowker or George H. Brown, or Elias C. Morse, or any tenant of any of the persons last above named, by the said plaintiff, or its predecessor in interest, for the possession of the premises so occupied by said defendant, as hereinbefore set forth, until within thirty days before the commencement of this action.

That during the period hereinbefore set forth, and while the said defendant Minerva Townsend and her grantors have been engaged in cultivating the said premises, as hereinbefore set forth, the said defendant and her grantors have been in the open, notorious and exclusive possession of the whole of said northwest quarter of said section twenty-four (24), up to the said fences fifty feet distant from the center of said track on the south side thereof, and up to the snow fence one hundred feet distant from said track on the north side thereof, and the officers and agents of said plaintiff and of its predecessor, the Northern Pacific Railroad Company, have had knowledge of said use and occupation. That up to thirty days before the commencement of this action, neither Minerva Townsend, nor

48 any of her grantors, have had actual knowledge of any right or claim by the plaintiff or its predecessor, the Northern Pacific Railroad Company, in or to the premises so occupied by said defendant Minerva Townsend and her grantors, as hereinbefore set forth.

Conclusions of Law.

And the court finds as conclusions of law that the plaintiff is entitled to judgment for the possession of the premises described in the complaint herein, and for costs, and it is so ordered.

Dated, St. Cloud, Minnesota, March 23rd, 1901.

By the court,

D. B. SEARLE,
District Judge.

Note.

This is an action brought by the Northern Pacific Railway Company to eject the defendants from two strips of land situate on either side of the plaintiff's railroad track where the same crosses the northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred thirty-four (134) north, range thirty-five (35) west, Wadena county.

The title of the plaintiff is founded on the grant by act of Congress approved July 2, 1864, to the plaintiff's predecessor in interest, the Northern Pacific Railroad Company (U. S. Stat. at Large, vol. 13, p. 365). By section 2 of this act it is provided:

"And be it further enacted that the right of way through the public lands be and the same is hereby granted to said
49 Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed, and the power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, materials of earth, stone, timber, etc., for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain. * * * "

It appears that on July 2, 1864, the land in question was public land and that the Northern Pacific Railroad Company constructed its road across the land in 1870 and 1871 and in November, 1871, filed a map showing the definite location of the road as constructed in the office of the Commissioner of the General Land Office at Washington.

These facts appearing it was conceded, on the argument, that the Northern Pacific Railroad Company acquired a right of way four hundred feet in width which included the strips now sued for. This concession was in accordance with the authorities construing similar acts of Congress granting rights of way.

Railroad *v.* Baldwin, 103 U. S., 426.
Bybee *v.* Oregon, etc., R. R. Co., 139 U. S., 663.

Some question was raised as to the nature of the estate conferred by this grant whether it was an easement, a qualified fee or an absolute fee. It is unnecessary to determine the precise technical nature of the estate or interest granted for the right conferred
50 is one possessory in its nature and is sufficient to sustain an action like the present one.

New Mexico *v.* U. S. Trust Co., 172 U. S., 171, 182.

The defendants, although conceding that the title of the Northern Pacific Railroad Company, plaintiff's predecessor, was originally valid, insist that this title and right of possession to the premises in controversy have been lost by reason of the fact that the defendants and those under whom they claim have been in adverse possession of the premises in question for more than fifteen years before the commencement of this action, and probably sufficient facts appear

regarding the occupation by the defendants and their predecessors to support the claim of defendants unless the peculiar character of the use to which the premises in question have been dedicated creates an exception to the general rule relating to actions for the recovery of real property.

It is contended by the plaintiff that the whole of its right of way granted by the act of Congress above referred to is charged with a public use and further that it is part of the railroad property, is inseparable from the franchises and is not subject to alienation and therefore cannot be lost by adverse possession.

The rule is well settled that the property of a quasi-public corporation which has received a franchise from the public, so far as it is necessary to a performance of the duties which the corporation owes to the public under its franchise, cannot be alienated without special legislative authority in that behalf. Considerations of public policy forbid a dismemberment of the property of such a corporation, and the resulting disability to perform those duties the performance of which is for the benefit of the public and which form the consideration of the grant of those special privileges which are enjoyed by the corporation.

51

Thomas *v.* Railroad Co., 101 U. S., 71.

Nor can such property be dismembered by proceedings *in invitum.*

Gue *v.* Tidewater Canal Co., 24 How., 257.
East Alabama R'd Co. *v.* Doe, 114 U. S., 340.

Furthermore, in the present case the right of way claimed by the plaintiff was granted by Congress, as the act recites, not merely for the purpose of aiding a road intended as a common carrier of goods and passengers, but also for the purpose of creating a Government agency for the transportation of the mails and of troops and munitions of war.

The single question to be decided in this case is whether the portions of the right of way here in question are inseparable from the railroad and its franchise in the sense and to the extent that they could not have been alienated by the plaintiff, or its predecessor, and could not have been taken on execution. In my judgment the determination of this question is decisive of this case and I think it must be determined by the inquiry whether the portion of the right of way in controversy is necessary to the operation of the road and the performance of those duties which the company owes to the public as a common carrier and to the Federal Government as its special servant.

52

The question is not free from doubt and neither the research of counsel, nor my own examination has discovered any authority which in a case like the present one decides the precise point. I am of the opinion, however, that upon analogy the principles laid down by the Supreme Court of the United States in Northern Pacific Railroad Company *v.* Smith, 171 U. S., 260, are controlling. In view of the fact that this right of way was granted by Congress over

the public lands for the purposes above mentioned, it seems clear that a construction by the Federal Supreme Court is binding upon the State tribunals.

The facts in Northern Pacific Railroad Company *v.* Smith are as follows: The action was brought by one Smith to recover from the railroad company certain lots situated within two hundred feet of the constructed railroad in the city of Bismarck, North Dakota. The company had filed a map of definite location showing the route of its line some two miles south of Bismarck, and afterwards, and without filing any new map, changed its location by constructing its road through the premises in controversy in the year 1873. In 1879 the town site of Bismarck, including the premises sued for, was patented to the mayor of that city, and in the same year,
53 1870, a deed was given to the plaintiff by the city authorities purporting to convey the premises in controversy.

It was contended by the railroad company that by virtue of the construction of the road the grant of right of way took effect and was defined by the constructed road and that under the grant the company took title to a strip four hundred feet in width. The court strongly inclines to the view that this position is correct and then proceeds to consider the case from the standpoint that the rights of the company under the grant were confined to the line defined by the map of definite location. The court reviews the authorities in many States which hold that, where a railroad is constructed across private property with the acquiescence of the land-owner, the railroad company acquires the right of occupancy and cannot be disturbed in its possession and the land-owner is relegated to a proceeding to recover damages for the land appropriated. The court then proceeds to consider the effect of the grant to the Northern Pacific Company, conferring a right of way four hundred feet wide upon the question of the quantity of land so appropriated and says:

"Upon principle and authority we therefore conclude that neither the city of Bismarck, as owners of the town site, nor its grantee Smith, can, under the facts and circumstances shown in this record, disturb the possession of the Northern Pacific Railroad Company in its right of way extending two hundred feet on each side of its said
54 road. The finding of the trial court, that only twenty-five feet in width has ever been occupied for railroad purposes, is immaterial. By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants. The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company; and, at any

rate, a forfeiture for misuser could not be enforced in a private action."

The rule laid down by the court is not the law of this State as respects the effect of an appropriation of private property for railroad purposes, (Minneapolis Western R'y Co. *v.* Minneapolis & St. L. R'y Co. *et al.*, 58 Minn., 128) but in the case under consideration the land appropriated by the railroad company was confessedly public land and the original title of the railroad company to the right of way is not questioned. I am, therefore, of the opinion that the decision of the Supreme Court of the United States is binding
55 on the proposition that in making the grant Congress gave a conclusive legislative determination that the right of way four hundred feet wide was necessary for a public work of such importance. Furthermore, upon principle I am inclined to the view that this is the safer ground upon which to rest. If it is competent for a court or jury to enter upon the inquiry in this case and to conclude and adjudge that the premises in question are not necessary for the operation of the road, it would be equally competent for a court to enter upon the same inquiry and adjudge that a strip of land only wide enough to carry the rails and ties was all that was necessary. It is apparent that the question to be determined is not only that of present necessity, but of future necessity also, and the examination of this question would in the nature of things involve a court in matters of speculation which cannot be the subject of proof.

I am of opinion that the plaintiff is entitled to judgment.

56 *Judgment.*

STATE OF MINNESOTA:

District Court, County of Wadena, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLECECK, Defendants.

This cause having come on to be heard by the court, without a jury, the parties, by their attorneys, consenting that the issue herein be tried without a jury, and a stipulation of facts having been filed herein, and the court having filed its findings of fact and conclusions of law and ordered judgment herein, on the 25th day of March, 1901, now, in accordance with said conclusions of law and order for judgment, it is

Ordered, adjudged and decreed that the plaintiff is the owner and entitled to the possession of those certain premises situate in the county of Wadena, and State of Minnesota more particularly described as follows, to wit:

Commencing at a point on the east line of the northwest quarter (N. W. ¼) of section twenty-four (24), township one hundred thirty

four (134) north, of range thirty-five (35) west of the fifth prin-
57 cipal meridian two hundred (200) feet north of the center line of the Northern Pacific railroad as the same is laid out, located and constructed over and across said section twenty-four (24); thence in a northwesterly direction parallel to and two hundred (200) feet distant from the line of said railroad to the west line of said northwest quarter (N. W. ¼) of said section twenty-four (24); thence south on the west line of the northwest quarter of said section twenty-four (24) four hundred (400) feet; thence in a southeasterly direction parallel with and distant two hundred (200) feet from the line of said railroad to the east boundary line of said northwest quarter (N. W. ¼) of said section twenty-four (24); thence north along the east boundary line of said northwest quarter (N. W. ¼) of said section twenty-four (24) to the place of beginning.

And it is further ordered, adjudged and decreed that the defendants deliver to said plaintiff the possession of said premises forthwith, and that the plaintiff do have and recover its costs and disbursements herein, which are hereby taxed and allowed in the sum of $—.

Witness the Honorable D. B. Searle, the judge of said court, and the seal of said court, at the town of Wadena, in Wadena county, Minnesota, this 25th day of March, A. D. 1901.

W. L. NORTHFOSS,
Clerk of the District Court, Wadena County, 7th Judicial Dist.,
By EUGENE BOYER.

58 *Notice of Appeal.*

STATE OF MINNESOTA:

District Court, County of Wadena, Seventh Judicial District.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLECECK, Defendants.

To C. W. Bunn, L. T. Chamberlain, and James B. Kerr, attorneys for the above-named plaintiff, and to W. L. Northfoss, clerk of said district court:

Please take notice that the above-named defendants appeal to the supreme court of the State of Minnesota from the judgment of said district court entered herein and docketed in the office of the clerk of said court on the 25th day of March, 1901, in favor of said plaintiff and against the said defendants.

Dated this 25th day of March, 1901.

A. G. BROKER,
Attorney for Defendants.

Waiver of Bond on Appeal.

The giving of a bond or making of deposit on appeal is hereby waived.

C. W. BUNN,
L. T. CHAMBERLAIN,
JAMES B. KERR,
Plaintiff's Attorneys.

59 12645.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1901.

NORTHERN PACIFIC RAILWAY COMPANY, Respondent,
vs.
ABNER TOWNSEND, MINERVA TOWNSEND, and Joseph Holece-k, Appellants.
} No. 173. Syllabus.

1. One who enters a tract of land under the United States homestead laws, across which the Northern Pacific Railroad Company had previously constructed its line of road, on the right of way provided for by the congressional land-grant act of July 2nd, 1864, may, as against such company, acquire title to a part of such way by adverse possession for the fifteen-year period prescribed by G. S. 1894, § 5134, a statute of limitations.
2. The entry under the homestead laws was in the year 1882, and subject,—of course—to the previously acquired rights of the beneficiary of the land-grant act. The adverse possession began soon after, and more than fifteen years prior to the commencement of this action to regain possession. Held, that it is immaterial that the receiver's final receipt was not issued to the entryman until December, 1887, and that the United States patent was not executed until July 1889.

Judgment reversed.

60 12645.

STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1901.

NORTHERN PACIFIC RAILWAY COMPANY, Respondent,
vs.
ABNER TOWNSEND, MINERVA TOWNSEND, and Joseph Holece-k, Appellants.
} No. 173. Opinion.

Ejectment brought to recover possession of two strips of land situate on either side of plaintiff's railway track where the same crosses three forties of the N. W. ¼ of § 24, T. 134, R. 35.

It is conceded that, under the land-grant act of July 2nd, 1864, the filing of a map of definite location in 1871, and by the construction

of its railway, the Northern Pacific Railroad Company, plaintiff's predecessor, acquired a right of way 400 feet in width where the road ran through and over what was then public domain, which included the ¼ sec. in question. These strips were originally part of this way.

The defendant, Minerva Townsend, is the grantee of two persons who entered these forties under the United States homestead act, subsequent to 1871, and to whom they were duly patented. She admits that the right of possession, and possession, constructively, at least, was originally in the plaintiff's predecessor, but
61 claims that possession and the right thereto has been wholly lost by reason of the fact that her grantors and herself have been in actual, open, notorious and adverse possession of these strips and cultivated the same continuously for more than fifteen years before the commencement of this action. The court below so found, and that this had been with the knowledge of the officers and agents of plaintiff company, and of its predecessor, the original beneficiary of the act of Congress by which the right of way was granted and its width fixed, but held that plaintiff was entitled to recover, because the right of way as the same was fixed by the act of Congress was charged with a public use to its full width and because, as a part of the railroad property, the way was inseparable from the franchise and was not the subject of alienation. Therefore no part of it could be lost by adverse possession.

Because of this peculiar public use to which the 400-foot strip had been devoted by the grant, it was held that the land in dispute was not subject to the operation of our statutes of limitation as to adverse possession. On appeal the question is whether any part of the right of way, as fixed and granted by the act of Congress, can be lost by adverse occupation for a period of fifteen years. The argument of counsel for the railway company is that as the right of way was granted by Congress to the company, to enable it to perform the duties which it owed to the public under its charter, and as the whole thereof was charged with a public use, and, as it is clear, upon principle and authority, that the company is without power to convey any portion thereof as granted, it inevitably follows that no part of this 400-foot strip is subject to any statute which would
62 reduce its width, or prevent the plaintiff company from using it, as a whole, for railway purposes and to its full width. The decisions, urge the counsel, are conclusive on the proposition that a railway corporation, owing duties to the public in the exercise of its corporate functions cannot by voluntary conveyance, or otherwise, part with any of its property necessary for a proper discharge of these duties.

A number of cases are cited in support of this statement. We see no reason to question the rules of law laid down in these cases, but, in our opinion, they are not in point here.

One of them, Thomas *v.* R'y Co. 101 U. S. 71, was where the defendant, railway company, undertook to lease all of its road, rolling stock and its franchise, for which leasing no special authority had

been conferred by its charter. The court held that such a contract was invalid.

Another, East Al. Railway Company *v.* Doe, 114 U. S. 340, was where a railroad corporation having a franchise to own and operate a road acquired an easement for its right of way through certain lands, partly by grant and partly by condemnation. After a part of its line was graded a judgment creditor levied an execution on the right of way and it was sold and conveyed to him by the sheriff. The court held that, by itself and separately, the right of way could not be sold on execution and that the creditor had obtained no title. In both these cases the acts complained of, a lease in one case and a forced sale of the right of way (an actual dismemberment of this right from the franchise) were of such a nature that the corporations could not perform the functions for which they were
63 created, or the duties which they owed to the public, should the acts be upheld. In the Thomas case the act of the company was clearly *ultra vires*, for it had no authority to lease and in attempting so to do was disabling itself from performing its corporate functions. In the Doe case the controlling idea was that the right of way, being a mere easement in the land, was indissolubly linked so long as they should exist, to the franchise, to the purpose of the existence of the corporation and to its public functions, and that they could not be separated by a sale of the right of way. The present case is not parallel to either of these. Here the company built its road more than twenty years ago, fenced a strip 100 feet in width—50 feet on each side of its track center—has used that strip and no more, and has acquiesced in the use and cultivation by defendants and their predecessors, of all of its original grant lying outside of its fences for more than fifteen years, under a claim of right. It has not attempted to lease its entire property, nor has there been a proceeding *in invitum*, whereby it could be prevented, by an actual dismemberment of its right of way from its franchise, from properly exercising its corporate functions or from performing its duties to the public. But in this connection we call attention to Crowley *v.* Minn. & St. Louis R. R. Co. 30 Minn. 541, wherein it was said, when considering a conveyance by a railway corporation, that no one whose interests are not affected, except the State, can call in question the capacity of the corporation to sell or hold property. But counsel point with emphasis to the case of Northern Pacific Railroad Co. the predecessor of this plaintiff, *v.* Smith, 171 U. S. 260, as being conclusive here.

We take their statement of the facts in issue, as correct.
64 Smith brought an action in ejectment against the company to recover possession of certain premises situated within two hundred feet of its track center as built within the limits of the town of Bismarck, North Dakota. It appeared that the company had originally located its line some distance south of the present site of that town and had filed its map of definite location in the office of the Commissioner of the General Land Office. Thereafter, in 1873, and without filing any new map, the company changed its location and constructed its road just where it has since remained.

Afterwards—in 1879—the town site of Bismarck, including the tract sued for, was patented to the mayor and the same year a deed of conveyance covering the premises in question, was executed to Smith by the town authorities. Upon these facts the court held, that, under the act or grant of Congress and by virtue of the construction of its road, the company obtained a right of way 200 feet in width upon either side of the center line of its tracks, as the same were laid upon the ground, that the rights of the plaintiff were subject to this grant to its specified width and that the tenants of the company could not be ejected from the property in dispute. That part of this decision to which attention has been called is as follows: "By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant, and of the find-
65 ing that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants."

It having been decided in this case that by its grant Congress conclusively determined that a strip four hundred feet in width was necessary for a right of way and, further, that a court could not cut it down to twenty-five feet, it is urged that it must follow that our statute of limitations cannot apply to any part of this grant—because the result would be to cut down the right of way to less than four hundred feet in width. But, in answer to this, attention may be called to the fact that in every State where the width of a railway right of way is fixed by statute, the legislature has quite as conclusively determined what width is necessary for the purpose, as has Congress by the act in question. It is impossible for us to see that the doctrine established in the Thomas case is determinative of this, or is in point at all. The mere fact that Congress has conclusively determined that the right of way should be four hundred feet in width across the public domain, and thereupon it was decided that what was thus declared to be necessary could not be cut down by the courts, does not infringe at all upon defendant's claim that the plaintiff company may lose a portion of its original right of way by adverse possession and be barred from recovery by the fifteen-year statute of limitations. The question was, whether, upon shifting its track line after filing a map of definite location, the company took a right of way under the act of Congress and to the width therein described, or a way of less width, what it actually used. Surely
66 no private person could question the right of the company to change its line, unless his rights had intervened and had become attached to land in dispute prior to such change. If this right to change could not be questioned it would necessarily follow that the Federal Government, only, could insist that the width of the right of way was not the same, wherever the road

might actually be constructed. No criticism could well be made of the language used, or the conclusion reached, but neither language nor conclusion control this case any more than they would if the right of way had been obtained under a provision of an act passed by the legislature of one of the States, or by purchase. But it is rather singular, when we consider the assertion made by counsel as to the impossibility of a railway company to part with any portion of its right of way, voluntarily or involuntarily, that in the Smith case the right to lease was recognized, for the only possession relied upon by the plaintiff company was that of its tenants, concerning which the court said :—"The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company." By this quoted expression the court distinctly recognized that the defendant company had leased, and had the power so to do, when the occupation of its tenants was not inconsistent with or opposed to the proper operation of its road and to the performance of its duties as a common carrier. And we are safe in saying that on the facts now before us the presumption arises
67 that the occupation by defendants of the tract in question, outside of the plaintiff's fences, conflicts not at all with a proper operation of its railway, and is not in the way of a complete performance of plaintiff's duties to the public.

The real object of this statute of limitations is to prevent litigation and to quiet title to land which has remained in the possession of another adversely, and in hostility to its true owner for the specified period of time. Such a law is a continual and decisive notice to owners that if they allow others to adversely occupy, use and improve their land for fifteen years continuously, they must be deemed to have acquiesced in the assertion of the occupant's claim of right to use the same, and to have abandoned all opposition thereto. There may be exceptional instance-, in which the nature of the right affected, or the character of the party in whom the title is vested will prevent the operation of the statute, but the facts here do not come within the exception. That a railway company may be deprived of a part of its right of way by adverse occupation for the statutory period of time, and that such an occupation will bar its right to eject its adversary, has often been determined by the courts of this country.

Pittsburgh C. C. & L. R'y Co. *v.* Stickley, 155 Ind. 312
Mathews *v.* L. S. & M. S. R'y Co. 110 Mich. 170;
Littlefield *v.* Boston A. R. Co. 146 Mass. 268;
Ill. Cent. R'y Co. *v.* Wakefield, 173 Ill. 564, and cases cited.
See also upon this subject 15 Harvard Law Review 146.

It has also been decided, that it is immaterial whether title is held by the company in fee-simple or is a mere easement or a qual-
68 ified fee, or an absolute fee. For whichever it is, the right conferred is a possessory one and sufficient to sustain an action of ejectment. Nor is it material whether the statute under which the defendants claim, is regarded as one indulging in

the presumption of a grant by the true owner, or is simply a statute of repose. We have held that it is the latter in Dean *v.* Goddard, 55 Minn. 290. We have also decided that real property belonging to municipal corporations and quasi-public corporations can be lost under the statute by adverse possession.

St. Paul *v.* Chicago etc. R. Co. 45 Minn. 387;
St. Paul etc. R. Co. *v.* Minneapolis, 45 Minn. 400;
Wayzata *v.* G. N. R'y Co. 50 Minn. 438.

Municipal corporations hold real property for public use and for public purposes in a greater sense than do railway companies hold their right of way. There is no reason whatever for determining that the former are subject to the operation of the statute and, at the same time, hold that the latter are exempt from the operation of the same law. Such a conclusion would take front rank among the legal absurdities.

Let us look at the judgment from which the defendants have appealed from a practical standpoint, and see what it means if the contention of plaintiff's counsel be sustained. The right of way granted under the act of June 2nd 1864, was east and west across and through this State from Lake Superior to the Red River of the North, over the public domain. Although part of the territory to be traversed had been disposed of by the Federal Government prior to the passage of the act, the grant came very near being a strip of land four
69 hundred feet wide for about 250 miles. If plaintiff's claim be upheld, we should have, stretching across the State from east to west, a strip of territory 400 feet wide, upon which no person could travel without committing a trespass; over which no railway company could obtain the right to lay its rails, and across which no public highway could be established, except by consent of plaintiff. If counsel should be sustained the public could not obtain the right, by proceedings under the statutes, or even by prescription, to a public way for ordinary travel and municipal authorities would have to enter into private negotiations with plaintiff in order to secure the privilege of a highway crossing of this strip. And so would corporations organized for public purposes and equipped with the right of eminent domain. Any and all of these proceedings would be as inimical to the rule which counsel assert in this case, and quite as open to the objections now relied upon, as is the application of the statute of limitations as to adverse possession to the facts now before us. It would be preposterous to announce a rule of law which would uphold and permit such a result.

No matter what rights the beneficiary of the grant may have to use and occupy, if it so chooses, its right of way over and through public domain to the full extent of four hundred feet, it is obvious that it must take this right subject to the statute relating to adverse possession. No other conclusion can be tolerated.

As to one forty of the three, it is claimed that from the findings, it clearly appears that the strips therein have not been and
70 could not be held adversely for the full period of fifteen years prior to the commencement of this action. From the

record it seems that this tract of forty acres was entered under the homestead laws of the United States by a man named Brown, February 1st, 1882, subject, of course, to the provisions of the prior grant to the N. P. Company. A receiver's final receipt was issued to him December 26th, 1887, and a patent July 24th, 1889. The claim is that prior to the time of the issuance of the final receipt, Brown was occupying the forty in subordination to the title of the United States and could not avail himself of the statute of limitations. It is urged that he could not, and was not holding possession adversely to all titles and to all claimants, and for this reason the statute does not apply. But it is immaterial when Brown obtained evidence of his title, his paper title. He initiated his adverse and hostile claim to the strips in dispute, upon making his homestead entry, more than fifteen years prior to the commencement of this action. He and his grantors continuously thereafter occupied parts of the forty with intent to claim the same as against the company. His entry and possession were adverse. Both were hostile in their origin and hostile in their continuance.

As to both strips, Mr. Brown and the defendants were precisely in the position of any one who had entered into possession thereof under a claim of title and without reference to the balance of the forty. But, if this were not so, and his and their title to these strips had to depend upon and be connected with his homestead entry, the fact is, that upon making this entry, in 1882, his rights
71 to the forty became fixed and certain. They were not subordinate to the Government title and could not be taken away from him by any other person, natural or artificial. And when the patent was issued to him, in the year 1889, it related back, for all purposes, to the time of the original entry.

No distinction between the forties can be made when considering and determining the question in issue.

The judgment appealed from is reversed, and upon remittitur, judgment may be entered in favor of the defendants.

COLLINS, *J.*

(Endorsed :) No. 12645. State of Minnesota supreme court. Northern Pacific Railway Co. respondent *vs.* Abner Townsend *et al.* appellants. Opinion and syllabus. Filed July 12, 1901. D. F. Reese, clerk. April term, A. D. 1901. Collins J.

72 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1901.

NORTHERN PACIFIC RAILWAY COMPANY, Respondent,
vs.
ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH Holacek, Appellants. } No. 173.

Pursuant to an order of court duly made and entered in this cause, on the 26th day of July A. D. 1901

It is here and hereby determined and adjudged that the judg-

ment of the court below, herein appealed from, to wit, of the district court of the seventh judicial district, sitting within and for the county of Wadena be and the same hereby is in all things reversed, and upon remittitur, judgment may be entered in favor of the defendants. And it is further determined and adjudged that the appellants above named, do have and recover of said Northern Pacific Railway Company respondent herein the sum and amount of forty-nine and $\frac{4}{100}$ dollars ($49.04) costs and disbursements in this cause in this court, and that said appellants have execution for the enforcement thereof.

Dated and signed this 26th day of July, 1901.

By the court,

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25.00
Clerk's fees, for making return	
Printer's fees	13.50
Clerk's fees, supreme court	10.00
Filing mandate	
Affidavits and acknowledgments	.25
Postage	.29
Copying returns for printer	
	$49.04

73 [Endorsed:] 12645 State of Minnesota, supreme court. Northern Pacific Railway Company respondent *vs.* Abner Townsend *et al.* appellants. Transcript of judgment. Filed July 26th A. D. 1901. D. F. Reese clerk.

STATE OF MINNESOTA, *ss:*

Supreme Court.

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court at the capitol in the city of St. Paul, this 26th day of July A. D. 1901.

D. F. REESE, *Clerk.*

74 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1901.

NORTHERN PACIFIC RAILWAY COMPANY, Respondent, vs. ABNER TOWNSEND, MINERVA TOWNSEND, and Joseph Holacek, Appellants. } No. 173. Appeal from District Court, Seventh Judicial District, County of Wadena.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1901, upon the return to the appeal herein.

Now after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be and the same hereby is, in all things reversed, and upon remittitur, judgment may be entered in favor of the defendants and that the appellants above named have judgment accordingly.

Entered July 26 A. D. 1901.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.

Attest: D. F. REESE *Clerk.*

75 [Endorsed:] No. 12643 State of Minnesota, supreme court. Copy of order for judgment. Filed July 26 A. D. 1901 D. F. Reese clerk. Entered on page —.

76 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1901.

THURSDAY MORNING, 9.30 O'CLOCK, *June* 20, *A. D.* 1901.

Court convened pursuant to adjournment. All the justices being present.

NORTHERN PACIFIC RAILWAY COMPANY, Respondent, vs. ABNER TOWNSEND, MINERVA TOWNSEND, and Joseph Holacek, Appellants. } Cal. No. 173. Reg. No. 12645.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel for appellant submitted upon brief by respondent and taken under advisement by the court.

A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.

Attest: D. F. REESE *Clerk.*

77 [Endorsed:] 12645 State of Minnesota supreme court. Copy of minutes of argument. Filed July 26 A. D. 1901. D. F. Reese, clerk.

78 [Endorsed:] No. 12645 State of Minnesota, supreme court. Northern Pacific Railway Company respondent against Abner Townsend *et al.* appellants Judgment-roll. Filed July 26th 1901 D. F. Reese clerk.

79 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, *Office of Clerk of Supreme Court,* } ss:

I, Darius F. Reese, clerk of the supreme court, State of Minnesota, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record, and all proceedings with all things concerning same had in the said supreme court of the State of Minnesota in the case between The Northern Pacific Railway Company, respondent, and Abner Townsend, Minerva Townsend and Joseph Holacek, appellants, including the opinion of the said supreme court therein as appears from the original files and records:

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing are, copies of the petition for writ of error with allowance of same and of the assignments of error and of the bond as the same remain on file and of record in said supreme court of the State of Minnesota and are the original writ of error from the Supreme Court of the United States and the original citation issued thereon, with proof of service thereof, and that the foregoing constituted a true full and complete return to said writ of error.

80 In witness whereof I have hereunto set my hand and the seal of said supreme court of the State of Minnesota at the capitol at St. Paul, Minnesota, this 21st day of August, A. D. 1901.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court, Minnesota,
By J. L. HELM, *Deputy.*

81 [Endorsed:] State of Minnesota, supreme court. Northern Pacific Railway Company appellant *vs.* Abner Townsend *et al.* respondents Return to U. S. Supreme Court.

Endorsed on cover: File No. 18,260. Minnesota supreme court. Term No. 160. The Northern Pacific Railway Company, plaintiff in error, *vs.* Abner Townsend, Minerva Townsend & Joseph Holecek. Filed September 6th, 1901.

C. P. 160.

FILED
DEC 8 1902

Brf. of Counsel Plff in Err.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed December 9, 1902.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

ARNIE TOWNSEND, MINERVA TOWNSEND AND JOSEPH HOLSOME.

BRIEF FOR PLAINTIFF IN ERROR.

C. W. BUNN and
JAMES B. KERR,
of Counsel.

18792

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 160.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

ABNER TOWNSEND, MINERVA TOWNSEND AND JOSEPH HOLECEK.

STATEMENT.

This is a writ of error to the supreme court of Minnesota. The question is, whether the railway company is devested of a parcel of its right of way granted by congress (act of July 2, 1864) by adverse occupation under the statute of limitations of Minnesota. The supreme court of Minnesota adjudged that its title would be so devested (Transcript, pp. 26-33) and so denied a right specifically

set up and asserted under the said act of congress.

The action was ejectment brought by the railway company to recover possession of a portion of the right of way granted by congress. The title relied on was the congressional grant. The judgment of the supreme court of Minnesota concedes the original validity of that title, but holds that it has been devested by adverse possession for the time made necessary by the statute of the state. We concede and conceded in the state court, that the adverse possession required by the state law had existed in point of fact for the necessary length of time. Our sole point in the state court was and in this court is, *that the statute could not operate to take away the title granted by the act of congress.*

Therefore the case clearly presents a question, which may be brought to this court by writ of error from the highest court of the state.

The transcript shows that the railroad referred to in the act of July 2, 1864, was built as required by the act and that the premises sued for lie within two hundred feet thereof (Transcript, pp. 10-15 and plat opposite p. 14). The railway fences were built fifty feet from the track, and a short snow fence on the north side was one hundred feet therefrom; outside the fence or fifty foot line lie two strips one on each side the track, both within two hundred feet therefrom. The whole hundred and fifty foot strip on the south side and that part thereof outside the snow fence on the north side of the track have been continuously cultivated and possessed by the defendants in error and

their grantors since about 1878 (Transcript p. 12).

The premises are within the grant of right of way granted by the second section of the act, which says, "two hundred feet in width on each side of said railroad, where it may pass through the public domain." The premises were public domain until after the road was built (Transcript, pp. 11-13).

By mortgage foreclosure the *railway* company plaintiff in error has succeeded to all the railroad property of the grantee in the act (Transcript, p. 12).

Assignment of Error.

Errors are duly assigned in the record (Transcript, pp. 4, 5). They may be summed up in one proposition, viz:

The court erred in holding that any part of the right of way conferred on the company by the act of congress can be devested and acquired by adverse occupation under a state statute of limitation.

Argument.

It is not doubted that some state limitation laws run against municipal corporations and even against the state. Whether they do depends entirely on their

terms and upon state policy. Both the construction and effect of such statutes are ordinarily purely questions of state law. We need not concern ourselves therefore with an inquiry, as to whether the state law in question would run against the state of Minnesota, or its municipal corporations. Neither is it important whether the state statute pre-supposes a grant or is merely one of repose. So much of the opinion of the supreme court of Minnesota (Transcript, pp. 30-31) as is devoted to these questions is immaterial to the question before this court.

Whether the statute can operate against the United States, or its agencies, or its grants made for purposes in which the whole nation has an interest, is a question of federal law, depending on the nature of the title against which the state statute is claimed to operate.

We take it as self evident that the law of the state cannot devest any title or right which the act of congress has made incapable of alienation.

If the premises in question might be granted or otherwise alienated by the railway company, we concede that limitation laws may operate upon them. But if the act of congress created a public trust, a right of way incapable of alienation by any act of the grantee, its officers and agents, then we submit that the property cannot be acquired adversely to the grantee by limitation.

We regard the test question as being, whether the railway company is capable under the terms of the act of congress of conveying, or estopping it-

self from claiming, the right of way granted by that act, or any part thereof.

Considering the great width of the grant and that it extended approximately two thousand miles through an unimproved and unpeopled country, it will appear quite natural and probable that the railway did not and could not go to the expense of clearing and fencing in the whole strip, and it is quite apparent that as settlers flocked into this vast region the company could not and probably would not desire to exclude them from cultivating or otherwise using such portions of this four hundred foot strip as were not for the time being required for railway uses.

But the time has come, as this case shows, when the company should know its rights and duties. So far as its private advantage is concerned it would probably be promoted by a decision that it may sell off such parts of its right of way as its officers think are not necessary to be held for railway use. Considering the growth of villages and cities along the line and the desirability of locations adjacent to the tracks, the value to the company of the right to sell strips and parcels of the granted right of way is apparent. Therefore our wish in this case is mainly, to have the company's rights and duties defined. Which way the case shall be decided is a secondary consideration.

That the Pacific railroads and the charter provisions for their maintenance and continuous operation were matters of general interest to the people of the nation will doubtless not be questioned. Sec-

tion 1 of the act conferred power on the corporation to lay out, locate, construct, furnish, maintain and enjoy, a *continuous* railroad and telegraph line from Lake Superior to Puget Sound. Through the public domain section 2 granted a right of way four hundred feet in width, exempt from taxation within the territories. Section 3 created a large land grant to secure the construction and continuous maintenance of the road. Construction was supervised by commissioners appointed by the president (sec. 4). Section 5 provided how the road must be built and that the company should not charge the government higher rates than individuals. The right of eminent domain was conferred by section 7. Section 9 reserved the right to congress to complete the road. Section 10 secured to all the people of the United States the right to subscribe for its stock. Section 11 made it a post road subject to the use of the United States for government service and subject to such regulations as congress might impose respecting charges for government transportation.

The court has decided in *New Mexico v. United States Trust Company*, 172 U. S., 171, that this right of way is not a mere easement, or right of passage, but a fee title, conferring on the company the sole and exclusive right of occupation.

In *Northern Pacific Railroad Company v. Smith*, 171 U. S. 260, 275, it was decided that the company was entitled to the full width of 200 feet on

each side of the road, and that this width could not be diminished by any court or tribunal upon the ground that a less width was sufficient for railroad purposes. The court said that by granting a way of 400 feet in width congress must be understood to have conclusively determined a strip of that width to be necessary for a work of such importance. The court said in the same case (p. 276) that a forfeiture for mis-user of this right of way could not be enforced in a private action.

It must doubtless be conceded that the company could not alienate *the whole* of this right of way, or any such part thereof as would disqualify the corporation from performing its public functions and from carrying out the scheme contemplated by the act. The grant of right of way is a public trust which the directors of the company have no right to alienate or fritter away.

The case comes, therefore, down to the question whether the directors and officers of the company have a discretion, in face of the expressed declaration of congress that 400 feet is necessary, to say that a less width of right of way is sufficient. While everyone must concede that for the time being a less width is entirely sufficient in most places, are the officers and directors of this company authorized to conclude that for all time a less width will be necessary? Has such a discretion been conferred upon them by the act of congress? Has the corporation itself any more right to determine that less width than 400 feet is necessary, and to sell off 300 feet than it would have to

sell the whole? If the corporation may sell a part where is the line to be drawn? Does not that doctrine imply the right to sell the whole? Has the corporation itself any more right than a court or jury to adjudge contrary to the declaration of congress, that 100 feet are sufficient? Is it not the better rule as indicated in the case of *Smith*, above cited, that the declaration of congress, to the effect that 400 feet in width is necessary, is conclusive?

If the corporation may sell off portions of the right of way, it may disqualify itself or seriously impair its ability to perform its public functions, and may prevent the government from having and at all times enjoying a military and post road. It is well proven that the wisdom of the corporation cannot safely be trusted to hold onto all that is or may be forever necessary. We have already reached the time when nearly all railway companies are hampered for lack of ground and other facilities, although they have more than anyone would have fixed as necessary thirty years ago. Neither will it do to concede the power of the corporation to sell, relying on its future ability to buy or condemn. For the price in time may be prohibitory or excessively burdensome; and the corporation could probably not be *compelled* to buy or condemn.

We submit that under the decisions of this court the corporation is incapable of alienating any part of the right of way granted by congress.

In *The York and Maryland Line Railroad Company v. Winans*, 17 How. 30, p. 39, the court speak-

ing by Mr. Justice Campbell, said:

> "Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature. *Beman v. Rufford*, 1 Simon N. S. 550; *Winch v. B. and L. Railway Company*, 13 *L. and E.* 506."

In *Gue v. Tidewater Canal Company*, 24 How. 257, it was held that the franchises and property of such corporations cannot be dismembered by sales on execution.

In *East Alabama Railway Company v. Doe*, 114 U. S. 340, it was held that right of way of a railway company could not be sold on execution, or otherwise, to a purchaser who did not own the franchise.

In *Thomas v. Railroad Company*, 101 U. S. 71, p. 83, the court said:

> "There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without power to make such a contract.
>
> "That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due per-

formance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

In *Hartford Insurance Company v. Chicago, Milwaukee & St. Paul Railway Company*, 175 U. S. 91, p. 99, the court sustained the validity of a lease by the railway company of a portion of its right of way; but it appears in the case that this lease was for one year (or such longer time as the lessee might be permitted to remain in possession) for the purpose of erecting and maintaining a cold storage warehouse. The court said that the railway company might permit its right of way to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad, *so long as a free and safe passage was left for the carriage of freight and passengers.* Under this language, it would seem, that in case of such a lease, if the necessities of the railway company for public use at any time in the future require it, the possession of the lessee must give way to the railway use. This appears to be the reason why such a lease is valid, and the same reasoning would lead to the conclusion that a permanent alienation of the property is void.

In *Grand Trunk Railroad Company v. Richard-*

son, 91 U. S. 454, p. 468, the court used this language:

> "If the buildings of the plaintiffs were rightfully where they were, if there was no trespass upon the roadway of the company, it was clearly a pertinent fact to be shown; and while it must be admitted that a railroad company has the exclusive control of all the land within the lines of its roadway, and is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others. It is not doubted that the defendant might have erected similar structures on the ground on which the plaintiffs' buildings were placed, if in its judgment the structures were convenient for the receipt and delivery of freight on its road. Such erections would not have been inconsistent with the purposes for which its charter was granted. And, if the company might have put up the buildings, why might it not license others to do the same thing for the same object; namely, the increase of its facilities for the receipt and delivery of freight? The public is not injured, and it has no right to complain, so long as a free and safe passage is left for the carriage of freight and passengers.

The following decisions in state courts support the contention: *Slocumb v. Chicago, Burlington & Quincy Ry. Co.*, 57 Iowa, 675; *Union Pacific Ry. Co. v. Kindred*, 43 Kas. 134; *Southern Pacific Company v. Hyatt*, 132 Cal. 240; *Railway Company v. Telford's Exec.*, 89 Tenn. 293.

To hold that the company may be devested of its title by abandonment, estoppel, deed, or hostile oc-

cupation leads at once into difficulties. The title under the act of congress, though a fee, is a conditional or base fee. It would be forfeited for breach of condition if the railway were abandoned and taken up. Why would not each parcel be forfeited for breach of condition as sold by the company or taken from it by adverse occupation? But the right to take advantage of a breach of condition would we think be in the United States. If the company abandons, the land must go back to the government, in order to enable it to secure the carrying on of the government post and military road. It has never, so far as we know, been decided and we think will not be, that the United States granted the right to enter for breach of condition to the patentees of the adjoining sections. After condition broken it must be that the right to enter is in the United States. The right to re-enter for breach of condition subsequent is not an estate in the land or a reversion and can be taken advantage of only by the parties or their privies in right of representation, as heirs, executors, etc., in case of natural persons, and by the successors of political bodies. Assignees and grantees of the reversion and privies in estate cannot take advantage of the condition. *Ruch v. Railway Co.*, 97 U. S. 693; *Shephard's Touchstone*, p. 149; *Bangot v. Warren*, 34 Maine 324; *Hooper v. Cummings*, 45 Maine 359; *Smith v. Smith*, 23 Wis. 180; *Nicoll v. Railway Company*, 12 N. Y. 121; *Rice v. Railway Company*, 12 Allen 141.

It is moreover a well established rule that

if the holder of a right to re-enter for breach of condition convey before making an entry, the right to enter for breach of the condition is gone. "The original maker of the condition cannot enforce it after he has parted with his right of reverter, nor can his alienee take advantage of a breach because the right was not assignable." *Hooper v. Cummings*, 45 Maine 359; *Rice v. Railway Company*, 12 Allen 141; 5 *Viner's Abridgment*, title Condition.

Moreover as stated in 2 Greenleaf, Cruise ch. 2:

> "A condition being entire cannot in general be apportioned by act of the parties; therefore a grantee of part of the reversion shall not take advantage of a condition. As if a lease be made of three acres of land reserving a rent upon condition; and the reversion of two acres of the land is granted away. The rent shall be apportioned by act of the parties; but the condition is destroyed; for that is entire and against common right."

For these reasons the United States will not be held to have parcelled out and sold its right of re-entry for condition broken by patenting the adjoining lands. The ultimate question in this case is, therefore, whether a state statute of limitation runs against the United States; not, let it be noted, with respect to land which the United States holds as a private proprietor, but with respect to a public trust in which the whole people are concerned.

C. W. Bunn and
James B. Kerr,
For Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 160.

THE NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLDICK.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

C. W. BUNN and
JAMES B. KERR,
Of Counsel.

Supreme Court of the United States.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

Some of the positions and statements in brief for defendants in error perhaps require some further comment.

1. Neither the question of the right of the company to open highways across its right of way, or the right of the public to do the same, is in anywise involved in this case. We have no disposition to question the ruling in *Northern Pacific Railway*

Company v. City of Spokane, 64 Fed. 508, where it was held that the company might dedicate such highways.

Most undoubtedly the right of way of the company is subject to the police, tax and other similar powers of the states through which it passes. The public has of necessity the right to open crossings for the convenience of travel at reasonable intervals and proper places. Such right does not materially interfere with the use of the right of way for railroad purposes.

The question here is quite a different one, viz., whether the company has a right to part with, or an occupier to acquire adversely to the company by occupation, the exclusive right to a substantial portion of the right of way, which, while it cannot be shown to be at present necessary for railroad purposes, may become so in the future.

2. The statement on page 26 of the brief, that the company has made deeds of portions of its right of way upon which thousands of innocent people have expended their means in permanent improvements, is not warranted by the record. Neither is the argument that the rule we contend for would work a serious hardship to a multitude of people. There is no warrant in the record for the further statement, which the brief contains in the same connection, that thousands of permanent structures have been erected by mercantile houses upon the rights of way of railroads of the country, and that

some of these grants are in perpetuity and some long time leases.

While it may be true as is perhaps shown in the case of *Northern Pacific Railway Company v. Ely*, 25 Wash. 386, that in some few cases permanent structures have been erected upon premises, which have been conveyed by the plaintiff in error, or its predecessor the federal corporation, such cases are by no means numerous. It must be admitted that many years ago a few such conveyances were made by the officers of the federal corporation. Since counsel has seemed to step outside the record, we think it not improper to say that the practice of the plaintiff in error has been, and for the most part the practice of its predecessor the federal corporation was, not to make any deeds of its right of way, and in granting leases to insert carefully drawn provisions by which the company may terminate them at any time. Where improvements are to be erected which cannot be removed, these leases contain a provision that the company shall pay for the improvements at an arbitrated valuation.

Counsel for defendants in error correctly says: "No business concern could afford to erect such structures under a mere license," and it is quite apparent that such leases as we have described do not carry a high rental and are not to the pecuniary advantage of the plaintiff in error. As we remarked in the opening brief, its pecuniary advantage will be greatly promoted if this court decides, that it may make absolute deeds or permanent long time

leases of any part of its right of way, which its directors choose so to dispose of. Counsel for the plaintiff in error have not felt warranted in advising that such conveyances or leases are valid.

C. W. BUNN and
JAMES B. KERR,
For Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 160.

THE NORTHERN PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

ABNER TOWNSEND, MINERVA TOWNSEND, and JOSEPH HOLECEK, *Defendants.*

BRIEF FOR DEFENDANTS

It is admitted by the stipulation of facts (Transcript, pages 10 to 15) that the land in controversy forms a part of the right of way granted to the Northern Pacific Railroad Company by an act of congress. It is also admitted that the defendants made settlement and acquired their title after the act. It is admitted that the United States issued to the defendants a patent of the land in controversy, and that the patent contains in terms no reservation or exception. The contention made by the defendants is that

the action is barred by the statute of limitations. It is conceded by plaintiff that the possession of the defendants is of the character and for the requisite time to consummate such bar, if the Minnesota statute of limitations applies to this plaintiff and the land in controversy. The plaintiff only denies the applicability of the Minnesota statute of limitations to an unused portion of the railroad right of way.

The plaintiff is not a federal but a Wisconsin corporation. If this court has jurisdiction, it is because the record presents a federal question. The question presented involves the construction of the Minnesota statute of limitations rather than the construction of an act of congress. Before this case was commenced, the supreme court of Minnesota held that the statute in question is merely a statute of repose and does not "indulge in the presumption of a grant" (*Dean v. Goddard*, 55 Minn., 290), and this doctrine is affirmed in the case at bar. (Transcript, p. 31). The legislature of Minnesota has the exclusive power to fix the time within which an action of ejectment may be maintained. It cannot be contended that the statute (fifteen years) violates any guaranty of the constitution. The construction of that statute by the state supreme court is final. We submit that there is, in fact, no federal question in this case, and that this court is bound by the construction put upon the

Minnesota statute of limitations by the supreme court of that state.

It is contended by plaintiff that it has no power to grant, or otherwise alienate any part of this four hundred feet strip, even though such part is useless for railroad purposes. It argues that this right of way is a thing sacred; that it constitutes a kind of Chinese wall extending from Lake Superior to Puget Sound, in which the state, the county, the city, the public, the individual can obtain no interest through grant or abandonment by the railway company or by long exclusive possession, or in any other manner. This right of way extends not only through fertile fields, but over mountain ranges and along the banks of many streams and rivers. It extends through the heart of great cities. If the contention of the plaintiff is correct, the public can never acquire the right to maintain a road or a street across it even with its consent; though the plaintiff should abandon some part of it, changing its line many miles to the north or to the south, acquiring its new right of way by purchase or condemnation, the old right of way must remain barren and unused. Upon their theory, in case of such abandonment, even the grantee of the government of the land subject to the right of way, could not take possession thereof or acquire any title therein.

The right of way granted by the act in ques-

tion is not different in character from the rights of way granted to other railroads by other special acts, or by the general act of 1875 (18 Stat., 482). The language is the same in substance. Nor is it different from a right of way obtained under the law of eminent domain. It will be observed that section 7 of the act in question gives the railroad company the power to obtain rights of way by condemnation proceedings. Likewise do statutes in each of the states. The object and purpose of all of these statutes are the same.

In *Northern Pacific Railway Company v. City of Spokane*, 64 Fed., 508, the Circuit Court of Appeals for the Ninth Circuit, construing this act, said:

> "The nature of the right of way through the public lands, which the railroad obtained by the grant, was no different from that which it had acquired from private lands by purchase or by condemnation proceedings under the laws of the several states through which it passed."

The question raised by plaintiff here was passed upon in that case. The railroad had platted an addition to the original townsite to Spokane Falls, called Railroad Addition, and had platted into lots not only land lying beyond the limits of its right of way, but also all of its right of way, except a strip two hundred and

twenty-five feet in width, in the centre of which lay its tracks, and had dedicated many streets across the right of way. Many years later it attempted to close one of these streets by constructing a freight station on the right of way in the centre of the dedicated street. This street had, in fact, never been graded or used. The city objected. The railroad company contended that it had the right to locate a freight station anywhere it deemed wise on its right of way, and that it did not have the power to divest itself of this use of its right of way or of this right by grant or otherwise. The Court of Appeals held the dedication to be valid, and that the railroad company could not locate its freight station on that part of its right of way. An appeal was taken by the company to this court, but was thereafter dismissed upon the motion of its counsel.

Not only did the predecessor of plaintiff, more than twenty years ago, dedicate streets across its right of way in the heart of the city of Spokane, but it also sold and conveyed lots and blocks carved out of this right of way to many different parties, who have erected thereon hotels, warehouses, and other permanent structures.

Northern Pac. Ry. Co. v. Ely, 25 Wash., 386.

In the case at bar, the supreme court of Minnesota in discussing this question, among other things, said:

"Let us look at the judgment from which the defendants have appealed from a practical standpoint, and see what it means if the contention of plaintiff's counsel be sustained. The right of way granted under the act of June 2, 1864, was east and west across and through this state, from Lake Superior to the Red River of the North, over the public domain. Although part of the territory to be traversed had been disposed of by the federal government prior to the passage of the act, the grant came very near being a strip of land four hundred feet wide for about two hundred and fifty miles. If plaintiff's claim be upheld, they should have stretching across the state from east to west a strip of territory four hundred feet wide, upon which no person could travel without committing a trespass; over which no railroad company could obtain a right to lay its rails, and across which no public highway could be established, except by consent of plaintiff. If counsel should be sustained, the public could not obtain the right by proceedings under the statutes, or even by prescription to a public way for ordinary travel, and municipal authorities would have to enter into private negotiations with plaintiff in order to secure the privilege of a highway crossing this strip. And so would corporations, organized for public purposes and equipped with the right of eminent domain. Any and all of these proceedings would be as inimical to the rule which coun-

> sel assert in this case, and quite as open to the objections now relied upon, as is the application of the statute of limitations as to adverse possession to the facts now before us. It would be preposterous to announce a rule of law which would uphold and permit such a result." (Transcript, p. 31.)

This quotation understates plaintiff's position. It contends not only that the rights mentioned cannot be acquired without its consent, but also that it has no power to consent.

The question raised by plaintiff has been considered by many courts in this country, and also in England and in Canada, and there is but one authority supporting its position. That is *Southern Pac. Co. v. Hyatt*, 132 Cal., 240. The reasoning of that court is that a railroad right of way is a public highway; that by the decisions of California, no part of a public highway can be lost by adverse possession, *ergo*, no part of a railroad right of way can be thus lost. There is no suggestion in the opinion that the court considered or had knowledge of the numerous well considered cases *contra*. A railroad is certainly not a public highway in the sense that it belongs to the people; but the public are trespassers if they go on the railroad right of way without the consent of the railroad, except when in a lawful street or way. The minor premise, that real property belonging to the public cannot be lost

by adverse possession is not in accordance with the weight of authority in this country, and has never been the law in Minnesota.

> *St. Paul v. Railroad Co.*, 45 Minn., 387.
> *Railroad Co. v. Minneapolis*, 45 Minn., 400.
> *Wayzate v. Railroad Co.*, 50 Minn., 438.
> *Transcript*, p. 30.

The supreme court of Indiana recently passed upon this question in *Pittsburg C. C. & St. Ry. Co. v. Stickley*, 155 Ind., 312; 58 N. E. Rep., 192. That court said:

> "Appellant finally insists that land acquired by a railway company for right of way or station purposes cannot be taken from it by adverse possession, because a railroad is a public highway, and because the statute forbids interference with the company's exclusive use. *A railway company owes certain duties to the public, but it holds and uses its property for the profit of its stockholders.* The cases holding that the statute of limitations affords no defence to actions for encroachment upon streets and roads are inapplicable. A railroad is not a public highway in the sense that it belongs to the people. *Railroad officers are not governmental agents whose laches creates no bar.* It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales, if the company resists.

Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co., 127 Ind., 250; 26 N. E., 784; 11 L. R. A., 740. If a company voluntarily disables itself to perform its duties to the public, its charter may be forfeited. *But there is no reason why a railway company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled if it wishes to avoid a forfeiture of its charter, to reacquire the land by purchase or condemnation.* It is true that the statute entitled a railway company to take land in fee, and forbids interference with the company's exclusive use. But the right to the exclusive use (which is an incident to every unqualified ownership) must be asserted. If one occupies adversely for twenty years land owned by a railway company, *the statute of limitations should raise the presumption of a grant, for the company holds its lands for private gain, as a private proprietor.* The state confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. *But it is not apparent why the state should be concerned in preventing investors in railway stocks from sustaining loss through the negligence of their agents.*" (Italics are ours.)

The supreme court of Illinois has held in several cases that a railroad company may lose part of its right of way by adverse possession.

Railroad v. Houghton, 126 Ill., 233.
Railroad v. O'Connor, 154 Ill., 550.
Railroad v. Moore, 160 Ill., 9.
Donohue v. Railroad Co., 165 Ill., 640.
Railroad Co. v. Wakefield, 173 Ill., 564.

In the Houghton case the court said:

"But it is insisted that the plaintiff's right of way, being a mere easement,—the fee running in Walker and his grantees, subject to the easement,—the possession of Walker and his grantees is to be regarded as being held under their title, and therefore not hostile to the plaintiff, so as to constitute it an adverse possession. To this view we are unable to yield our assent. If the right of way of a railroad company were an easement, the proper enjoyment of which was consistent with the possession and occupancy of the land by the owner of the fee, such possession and occupancy might be regarded as a mere exercise by the owner of the servient estate of his property rights, subject and in subordination to the easement. Such, however, is not the character of the easement which a railroad company acquires in the land covered by its right of way. As said in *Hazen v. Railroad Co.*, 2 Gray, 574; 'The right acquired by the corporation, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature, and practically exclusive.' The same view was taken by the supreme

court of Vermont in *Hurd v. Railroad Co.*, 25 Vt., 116, where, in discussing the interest obtained by a railroad company in its right of way by condemnation, the court said :— 'If that interest is regarded as a mere servitude or easement, the land nevertheless becomes so far the property of the corporation that their right is exclusive in its use and possession during its existence, as much so as that of the owner or occupant of the adjoining land. Those from whom the land was taken retain no right to its use or occupation for pasturage or otherwise. The object for which it is appropriated and used is wholly inconsistent with such right on the part of the former owner, as well as with that security to themselves and safety to the public which is necessary to enable the corporation to enjoy the franchises granted by their charter.' In *Jackson v. Railroad Co.*, *Id.*, 150, the same court, speaking through Mr. Chief Justice Redfield, says :—'The railway company must, from the very nature of their operations, in order to the security of their passengers and workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode, and for any purpose.' *Railroad Co. v. Potter*, 42 Vt., 256; *Railway Co. v. Allen*, 22 Kan., 285. In *Railroad Co. v. Godfrey*, 71 Ill., 500, this court held that the right of way was the exclusive property of the rail-

road company, upon which no unauthorized person had a right to be for any purpose; and in the opinion of this court in *Railroad Co. v. Patchen*, 16 Ill., 198, it is said:—'I presume the right to the land upon which railroads are built is not strictly analagous to the easement of the public in highways, leaving the fee in the owner of the soil, but is an absolute ownership in fee for railroad purposes.' While we are not disposed to hold that the deed from Walker to the plaintiff conveyed to the plaintiff an estate in fee in the right of way, it is clear that in conveying an estate which, so far as the right of possession for railroad purposes is concerned, had most of the qualities of the fee. The right of possession thereby conveyed was exclusive, and was wholly inconsistent with the subsequent possession of the land or any part of it by the grantor or his assigns for the purpose of grazing or agriculture, or as a part of the farm to which it originally belonged. The possession of Walker and his assigns, being wholly inconsistent with the plaintiff's title, and having been held under a claim of title on their part, has been hostile, and has constituted an adverse possession; and, such possession having been continued for more than 20 years, the plaintiff's right to bring its action for the recovery of said lands is barred by the statute. The finding of the court was therefore in accordance with the evidence, and the judgment must be affirmed."

In the Moore case the right of way was obtained through legislative grant.

That a third party may obtain title to a strip of railroad right of way by adverse possession is sustained by the following additional authorities:

Matthews v. Lake Shore & M. S. Ry. Co., 110 Mich., 170.

Turner v. Fritchburg R. R. Co., 145 Mass., 143.

Gay v. Boston A. R. Co., 141 Mass., 407.

Paxton v. Yazoo & M. V. R. R. Co., 76 Miss., 536.

Spottswood v. Morris & E. R. Co., 61 N. J. Law, 322.

Northern Pacific Ry. v. Ely, 25 Wash., 384.

Bobbitt v. Ry. Co., 9 Q. B. Div., 424.

Norton v. Ry. Co., 13 Ch. Div., 268.

Railway Co. v. Rosseau, 17 Ont. App., 483.

It is true that the defense of adverse possession was held insufficient under the facts in the cases cited by plaintiff at the bottom of page 11 of its brief, but the decisions in those cases were not based on the principle advocated here by the railroad company, but on the principle that the railroad right of way is an ordinary easement, and that both the owner of the fee and the railroad may be in possession, and that the possession of the owner of the fee was not adverse, but permissive.

The principle enunciated in those cases is not only contrary to the weight of state authority, but is repudiated by plaintiff in the case at bar, and the contrary thereof was held by this court in *New Mexico v. Trust Co.*, 172 U. S., 171. In that case this court, discussing a railroad right of way under a congressional grant like the one at bar, said:

> "But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted—one having the attributes of the fee, perpetuity and *exclusive* use and possession; also the remedies of the fee and like it corporeal, not incorporeal property."

It is admitted by plaintiff that defendants' possession is in fact adverse and not permissive, and that the plaintiff can not recover if it has the power to grant or alienate in any manner any unused part of its right of way. (Brief, p. 2.)

Abandonment of part of a right of way, the remainder being still used, will not extinguish the entire right of way, but only so much of it as has been abandoned.

> *Latimer v. Livermore*, 72 N. Y., 174.
> *Louisville etc. R. R. Co. v. Covington* (Ky.), 2 Bush., 526.

If a grant is to be presumed by adverse possession, the plaintiff would be in the same position

as if it had given a deed of the property to defendants and was seeking to set it aside and for possession, upon the ground that the deed was *ultra vires*. This it could not do. It was said by this court in an action brought to set aside a conveyance of a railroad for the term of 999 years, that:

> "When the parties are in *pari delicto* and the contract has been fully executed on the part of the plaintiff by the conveyance of the property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract."

St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S., 393.

Plaintiff cites *Thomas v. Railroad Company*, 101 U. S., 71. That is an action upon an unexecuted part of a lease given by the railroad company of its entire property. The court held that the lease was void as against public policy, and an action upon an unexecuted part thereof could not be maintained. The court recognized the principle in that case thereafter more fully enunciated in *St. Louis R. R. Co. v Terre Haute*, 145 U. S., 393, cited above, saying:

> "We cannot see that the present case comes within the principle that requires that contracts, which though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction."

It is settled by the authorities cited above, and the cases referred to therein, that if a railroad company should grant its whole property, or a part thereof, in contravention of its charter provision, or of statute or public policy, that if the grant were executed, the railroad company could not rescind the same or regain possession of the property upon the ground that its act was *ultra vires*. It is clear that the deeds given by the Northern Pacific Railroad Company, the predecessor of the plaintiff, of parts of its right of way referred to in the opinion of the court in *Northern Pacific Railway Co. v. Ely*, 25 Wash., 386, cannot be adjudged void at the instance of the railroad, and that the railroad cannot regain possession of the land because of the invalidity of the grant. It is admitted by plaintiff in its brief that if the railroad company could not regain possession of a part of its right of way that it had previously conveyed, that likewise it cannot regain possession of a part of its right of way held adversely by third parties for the statutory period. In its brief, page 4, it is said:

> "If the premises in question might be granted or otherwise alienated by the railway company, we concede that limitation laws may operate upon them * * * We regard the test question as being whether the railway company is capable under the terms of the act of congress of conveying or estopping itself from claiming the right of way granted by that act, or any part thereof."

If it would be in violation of its powers for the plaintiff to alienate or abandon any part of its right of way, no matter how small or useless, the validity of its acts can be questioned only by the government.

National Bank v. Matthews, 98 U. S., 621.
American Emigrant Company v. Adams County, 100 U. S., 61.
Fritts v Palmer, 132 U. S., 232.

It is insisted by plaintiff that this right of way is a fee title, citing *New Mexico v. United States Trust Co.*, 172 U. S., 171. That case only decides that the right of way is not an ordinary easement because the railroad has the right of exclusive possession, citing various state authorities holding that such right of way is an easement with the added right of exclusive possession. Such is also the holding of the state authorities cited *supra*.

We think the question is not very material in the case at bar because whether the railroad company's interest is that of an easement or a qualified fee does not affect the question of adverse possession. In either case it may lose that interest by adverse possession. We think, however, it was the intention of congress to grant that which is usually meant by the words "right of way," that the railroad company acquired an easement only with the right of exclusive possession, and that the grantees from the government under the preemption and homestead acts of the various quarter sections through which the railroad runs, without reservation of the railroad right of way in the patents, acquired the fee simple title to the land, subject to the railroad easement. It is impossible to believe that congress ever intended that if the right of way of the railroad company should be abandoned through any quarter section of land, and the railroad company should take up a right of way at some other point, as in the Smith case, that the four hundred feet strip constituting the original right of way became the property of the government and might be granted by it to third parties under the provisions of any of the various acts of congress providing for the acquisition of public lands. The fact is that a contrary interpretation has been placed upon these acts by the various departments of the government from the begin-

ning, because the settler has not only obtained patents in all instances without mention of this right of way, but has also paid the government for the entire acreage included within his settlement without such reservation.

Plaintiff relies upon *Northern Pacific Railroad Company v. Smith*, 171 U. S., 260. In that case there was no question of adverse possession of any part of the right of way. On the contrary, the court said:

> "The lots in question are within two hundred feet of the main track of this railroad as actually constructed and have been occupied by the defendant (railroad company) during the entire period since the construction of the road, excepting lots 11 and 12, which during about three years were in the adverse possession of Browning & Wringrose and of Patrick R. Smith, the defendant in error, as the tenant of said firm."

As to the two lots referred to, the railroad company brought an action in ejectment in 1877, and recovered possession of the same. There is no question in this case which was involved in the Smith case. It is true that the court said in that case:

> "The finding of the trial court that only twenty-five feet in width has ever been occupied for railroad purposes is immaterial. By granting a right of way four hundred feet

in width, congress must be understood to have conclusively determined that a strip of that width was necessary for public work of such importance, and it was not competent for a court, *at the suit of a private party*, to adjudge that only twenty-five feet thereof was occupied for railroad purposes, in face of the grant, and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, *and that the railroad was in actual possession thereof by its tenants.*" (Italics are ours.)

While the above quotation is dictum, we think we have a right to assume, considering the facts of that case, that all this court intended to say is that in a suit brought by a private individual for the possession of a part of this right of way, that he cannot raise the question as to whether or not a part of the right of way is useless, when the railroad is in the actual possession of the whole thereof; that the conclusive determination of the grant is only against the individual who desires to prevent the road from obtaining possession of the right of way in the beginning, but that it is not a determination against the railroad that it may not by act or deed abandon or release any part of its right of way.

The question suggested in the opinion in above case is not in issue in the case at bar. It was not alleged by the plaintiff that the small strip

of farming land in controversy was necessary or even useful to the plaintiff, nor was it alleged by the defendants that it was useless to or not needed by the railroad. This is not the "suit of a private party," but an action by the railroad to recover possession of certain land of which it has been out of possession for over fifteen years.

Plaintiff cites *Gue v. Tidewater Canal Company*, and *East Alabama Railway Co. v. Doe*. These cases hold that a railroad property cannot be dismembered by a creditor upon execution sales. The principle involved is no different than that decided by this court in *Muller v. Dows*, 94 U. S., 444, in which it was held that in a mortgage foreclosure suit of a railroad property, it was against public policy for the railroad to be sold in fragments, but that the entire property should be sold, although a part thereof did not lie in the state where the action was commenced. The doctrine of that case has been followed in railroad mortgage foreclosures.

Low v. Blackwell, 87 Fed., 400.
Central Trust Co. v. Wabash, 29 Fed., 620.

We believe that to be the general doctrine in the state courts and that there is no decision *contra* in the courts which have held that an unused strip of a right of way may be lost by adverse possession or abandonment.

The supreme court of Illinois recognized this

doctrine in *Craft v. Indianapolis D. & W. Railroad Co.*, 166 Ill., 580, in which case the court said, among other things, after citing the case of *Muller v. Dows*, and quoting from the opinion of that case :

> "The law of this case has since been frequently recognized and followed by the same court. The decisions of the courts of Pennsylvania, New York, Connecticut, Indiana and other states are to the same effect.
>
> "The doctrine is reasonable and just to all parties interested in such mortgages. * * * We think the decree of the superior court of Marion county has the same effect upon the mortgaged property west of the state line as it had upon that east of it."

The supreme court of Indiana, in *Farmers' Loan & Trust Company v. Canada & St. L. R. R. Co.*, 127 Ind., 250, held that a part of a railroad could not be sold under a mechanics' lien judgment. That court said :

> "The public has a right to have a railroad remain an entirety and it would be destructive to public interest to permit it to be broken up into disjointed and practically useless fragments. Sound policy and due regard for public welfare, as well as for the rights of individuals, require that a railroad shall be treated as an entirety, both as to the mode of acquiring a lien and as to the mode of its enforcement."

This principle was not overlooked by that court when it held that a part of the railroad right of way might be lost by adverse possession.

> *Pittsburg C. C. & St. L. R. R. Co. v. Stickley*, 155 Ind., 312.

The opinion in the latter case referred to the former case, saying:

> "It is true that, for reasons of public policy, a judgment creditor will not be permitted to destroy a railroad by cutting it into parcels on execution sales if the company resists. *Farmers' Loan and Trust Co. v. Canada & St. L. R. R. Co.*, 127 Ind., 250. If a company voluntarily disables itself to perform its duties to the public, its charter may be forfeited. But there is no reason why a railroad company should not be permitted to dispose of land it does not need in fulfilling its public duties, or why, if it disposes of land it does need, it should not be compelled, if it wishes to avoid a forfeiture of its charter, to reacquire the land by purchase or condemnation * * * If one occupies adversely for twenty years land owned by a railway company, the statute of limitations should raise the presumption of a grant, for the company holds its land for private gain, as a private proprietor. The state confers the power of eminent domain to enable railway companies to perform efficiently their duties as common carriers. But it is not apparent why the state should be

concerned in preventing investors in railway stock from sustaining loss through the negligence of their agents."

The case of *Grand Trunk Railroad Company v. Richardson*, 91 U. S., 454, and *Hartford Insurance Company v. Chicago, M. & St. P. R. R. Co.*, 175 U. S., 91, are both cases brought for the negligent destruction by fire of buildings upon the right of way. In the Grand Trunk case, the structures were a saw mill, boarding house and lumber yard. The court held that the railroad company had the right to permit them to be on the right of way. In the Hartford Insurance Company case, the railroad company had given a lease of a part of its right of way for a warehouse. The court held that the lease was valid and that the railroad company would have to respond in damages for the negligent destruction of the property. The court said:

"A railroad corporation holds its station grounds, railroad tracks, and right of way for the public use for which it is incorporated, *yet as its private property* and to be occupied by itself or by others in the manner which *it may consider* best fitted to promote, or not to interfere with the public use."

* * * * * * * * * * * * * * *

"In the case at bar, no one had the right to put a warehouse or other building upon the land of the railroad corporation without *its*

consent and the corporation was under no obligation to the public or to the partnership to permit the latter to do so." (Italics are ours.)

It seems clear that the railroad corporation has the right to grant to another possession of any part of its right of way, at least that part which it does not occupy with railroad tracks, station or other structures, and that whether or not it shall do so shall be determined, not by the government, but by the corporation itself; also whether such grant shall be for one year, ten years, or in perpetuity, rests in the discretion of the railroad officers, and that the corporation cannot set aside any of its grants or contracts upon the theory that the government might object. The railroad corporation makes its contracts as a private proprietor, and its contracts are as sacred as those of the humblest corporation or individual. If the corporation, at some time in the future, should conclude that it desires possession of the property it has granted to others, it cannot come into court and rescind its contract at its own volition, but must like any other corporation or person purchase the property, which because of its quasi public character it has been given the power to do by the statutes of the various states and by acts of congress, even against the will of the other party.

Under the rule contended for by plaintiff, it can, at any time, repudiate the many deeds and leases that it has given of parts of its right of way which it has not desired to use and upon which thousands of innocent people have expended their means in permanent improvements. This rule would work a serious hardship not only on these parties but on the general public and the railroads as well. It is well known that thousands of permanent structures have been erected by mercantile houses upon the rights of way of the railroads of the country, and that for the economical transaction of business it is necessary that this should be done. Some of these grants are in perpetuity and some long time leases. No business concern could afford to erect such structures under a mere license, or under a contract which would not be for such length of time as to be practically a grant of the fee and exclusive possession, nor would it be possible for such mercantile houses to erect any permanent structure if the grant or contract could be, at any time, repudiated or set aside because of disagreements over freight rates, or at the mere whim or caprice of the officers of the railroad. The business of the country would be seriously hampered. The railroads, the shippers and the general public would suffer.

Under the rule we contend for, supported by the English and state authorities, no harm can

be done the government, the public, the railroad corporation, or its grantees.

This, however, is not merely a question of whether the railroad had the right to convey a useless part of its right of way or whether in a suit brought by the railroad the question of want of power can be used by it to repudiate its contracts, but it is also a question of whether this railway company, a Wisconsin corporation, is bound by the statute and laws of the state of Minnesota as to its property within that state.

We submit that there is merit in the statement of the supreme court (Transcript, p. 31):

> "No matter what rights the beneficiary of the grant may have to use and occupy, if it chooses, its right of way over and through the public domain to the full extent of four hundred feet, it is obvious that it must take this right subject to the statute relating to adverse possession. No other conclusion can be tolerated."

A. G. BROKER,
F. T. POST,
HAROLD PRESTON,
For Defendants.

Supreme Court of the United States.

No. 160.—October Term, 1902.

The Northern Pacific Railway Company, Plaintiff in Error, vs. Abner Townsend et al. } In error to the Supreme Court of the State of Minnesota.

[May 4, 1903.]

This controversy concerns the validity of an asserted title, by adverse possession, to a portion of the right of way in Wadena County, Minnesota, granted to the Northern Pacific Railroad Company, its successors and assigns, by the second section of the act of Congress, approved July 2, 1864. (13 Stat. 365.) The plaintiff in error, the Northern Pacific Railway Company, a corporation of the State of Wisconsin, acquired the railroad and property of the former named company on or about August 31, 1896, by purchase at a sale under foreclosure of certain mortgages.

By the first section of the act of 1864, the Northern Pacific Railroad Company was created a corporation, and was empowered to construct and maintain a continuous railroad and telegraph line from a point on Lake Superior to some point on Puget Sound. In the second section of the act it was provided, among other things, as follows:

"*And be it further enacted*, That the right of way through the public lands be and the same is hereby granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad, where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables and water stations; and the right of way shall be exempt from taxation within the territories of the United States. . . ."

Section 3 created a large land grant to secure the construction and continuous maintenance of the road. Construction was to be supervised by commissioners appointed by the President. (Sec. 4.) Section 5 provided how the road must be built, and that the company should not charge the government higher rates than individuals. The right of eminent domain was conferred by section 7. In section 8 conditions of the grant in respect to the commencement and completion of the construction of the road were enumer-

ated. Section 9 reserved the right to Congress to complete the road. Section 10 secured to all the people of the United States the right to subscribe for its stock. Section 11 made it a post road subject to the use of the United States for government service. and subject to such regulations as Congress might impose respecting charges for government transportation. The remaining provisions of the act dealt with the mode of acceptance of the grant, the powers and duties of the board of directors and other officers of the company, the payments of cash assessments and other subjects. We need only further particularly refer, however, to section 18, wherein it was provided that the railroad company, previous to commencing the construction of its road, should obtain the consent of the legislature of any State through which any portion of its line might pass. Such consent was duly given by the State of Minnesota.

The company signified its acceptance in writing, as provided in the act. In November, 1871, the line of road was definitely located and a duly approved map was filed showing said definite location. This line crossed the northwest quarter of section 24, township 134 north, of range 35, west of the fifth principal meridian, Minnesota. At that time, as well as prior thereto, said quarter section was public land, to which the United States had full title, and the same was not reserved or otherwise appropriated, nor had any entries or filings or applications to make entry or filing thereon been made. During the years 1870 and 1871 the railroad was duly constructed through the section referred to, and the portion of the road thus constructed was thereafter duly accepted by the President.

In December, 1878, and February, 1882, homestead entries were initiated on said northwest quarter of section 24, and on November 30, 1885, and July 24, 1889, patents, which purported to convey the whole of each forty-acre subdivision, were issued to Abner Townsend and George H. Brown respectively. Subsequently, in 1886 and 1888, the title to said northwest quarter was conveyed to the defendant in error, Minerva Townsend. During the occupancy of the homesteaders they cultivated up to the line of the ordinary and snow fences of the railroad, situated respectively fifty and one hundred feet from the center of the track, and such occupancy continued a sufficient length of time to constitute a title by adverse possession under the limitation statutes of Minnesota. Demand was made by the railroad company for possession of that portion of the quarter section which was within the granted right of way, and upon non-compliance an action of ejectment was brought in a court of the State of Minnesota to recover possession of the disputed ground. The case was tried by the court without a jury. Lengthy findings of fact were made, and as a conclusion of law the court found that the railroad company was entitled to the possession of the premises described, and entered judgment accordingly.

On appeal, the Supreme Court of Minnesota reversed the judgment of the trial court. (84 Minn. 152.) The cause was then brought to this court.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to pre-emption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.

Conceding the adverse possession and its efficacy under the State law as against the railroad right of way, to be as found by the State court, the sole question which arises then for decision is whether, in view of the provisions of the act of Congress to which we have referred, an asserted title by adverse possession can be made efficacious as respects the property in controversy. And depending, as this question does, upon the nature and effect of the acts of Congress, its solution necessarily involves a Federal question.

In determining whether an individual, for private purposes may, by adverse possession, under a State statute of limitations, acquire title to a portion of the right of way granted by the United States for the use of this railroad, we must be guided by the doctrine enunciated in *Packer* v. *Bird*, (137 U. S. 661, 669,) and approvingly referred to in *Shively* v. *Bowlby*, (152 U. S. 1, 44,) viz: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee." Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered, (*New Mexico* v. *United States Trust Co.*, 172 U. S. 171, 181; *St. Joseph & Denver City R. R. Co.* v. *Baldwin*, 103 U. S. 426,) it must be held that the fee passed by the grant made in section 2 of the act of July 2, 1864. But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the Baldwin case) "to those necessarily implied, such as that the road shall be . . . used for the purposes designed." Manifestly, the land

forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a statute of limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly, for, as said in *Grand Trunk Railroad* v. *Richardson*, (91 U. S. 454, 468,) "a railroad company is not at liberty to alienate any part of its roadway so as to interfere with the full exercise of the franchises granted." Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern Pacific Railroad Co.* v. *Smith*, (171 U. S. 261, 275,) speaking of the very grant under consideration: "By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

To repeat, the right of way was given in order that the obligations to the United States assumed in the acceptance of the act might be performed. Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company.

Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a State is not amenable to

the police power of the State. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use.

As our construction of the act of Congress determines the question presented for decision, it becomes unnecessary to review the cases which have been called to our attention supporting on the one hand or denying on the other the broad contention that title by adverse possession, under State statutes of limitation, may be acquired by individuals to land within the right of way of a railroad. None of the cases adverted to as holding the affirmative of the proposition even suggest that the rule would be applicable where its enforcement would conflict with the powers and duties imposed by law on a railroad corporation in a given case. As here we find that the nature of the duties imposed by Congress upon the railroad company and the character of the title conferred by Congress in giving the right of way through the public domain are inconsistent with the power in an individual to acquire, for private purposes, by limitation, a portion of the right of way granted by Congress, the cases in question are inapposite.

The judgment of the Supreme Court of Minnesota must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

And it is so ordered.

Mr. Justice HARLAN and Mr. Justice BROWN dissent.

True copy.

Test:

Clerk Supreme Court, U. S.